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Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-3521

GEORGE H. BOHLINGER III,
PETITIONER,

v.

PETER F. LaFRANCE.
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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OCTOBER TERM, 1974.

No.

GEORGE H. BOHLINGER III,
PETITIONER,
v.
PETER F. LaFRANCE.
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the court below (App. A) has yet to be reported. The memorandum and order of the court below relating to the Commonwealth's motion for stay (App. B) is reported at *LaFrance* v. *Bohlinger*, 487 F. 2d 506 (1st Cir. 1973). The opinion of the District Court (App. C) is reported at *LaFrance* v. *Bohlinger*, 365 F. Supp. 198 (D. Mass. 1973). The order of the District Court denying the Commonwealth's motion for a stay (App. D) is not reported. The memorandum, findings, and recommendation of the magistrate (App. E) is not reported. The opinion of the state court (App. F) is reported in *Commonwealth* v. *LaFrance*, Mass. Adv. Sh. (1972) 177, 278 N.E. 2d 394.

Jurisdiction.

The judgment of the court below was entered on June 28, 1974. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

I. Whether the Court of Appeals erred in ruling that the respondent (hereinafter "defendant") had exhausted his available state remedies.

II. Whether the Court of Appeals erred in sustaining the order of the District Court issuing the writ of habeas corpus and discharging the defendant from custody without permitting the petitioner (hereinafter "Commonwealth") an opportunity to be heard on the merits of the issues involved.

III. Whether the Court of Appeals erred in finding that the defendant had stated a federal question.

IV. Whether, assuming, *arguendo*, that the Court of Appeals properly reached the merits of the allegations contained in the petition for writ of habeas corpus, the Court erred in finding that the defendant had been denied due process of law during the course of a state criminal trial which resulted in his conviction.

V. Whether the Court of Appeals properly remanded the case to the state court.

Statement of the Case.

On October 6, 1970, one Paul Butler was struck and killed by a car on Route 140 between the towns of Taunton and Norton, Massachusetts. After an investigation, LaFrance was arrested and charged with the crime.

At the defendant's state trial, the government called one Richard Brown as a prosecution witness. Brown thereupon attempted to establish an alibi for LaFrance by tes-

tifying in substance that he and the defendant had been at a friend's apartment during the time Butler had been killed. The prosecution was then permitted to ask Brown questions based upon a signed statement Brown allegedly had given to the police during the course of their investigation.

The content of Brown's statement, which had been made outside of LaFrance's presence, indicated that Brown and the defendant had taken methadone earlier that night; had driven to Attleboro in a stolen car operated by LaFrance; returned to Taunton; and struck the decedent.

During the course of questioning, Brown testified that he executed the written statement as a result of threats made by the police while he was withdrawing from the effects of drugs. The jury was present during the questioning of Brown. They were instructed to consider the question only as affecting Brown's credibility. These instructions were re-emphasized in the final charge. There was other testimony which implicated LaFrance in the crime.

In February, 1971, the defendant was convicted upon a jury verdict in the Bristol County (Massachusetts) Superior Court on four indictments charging manslaughter, leaving the scene of an accident after causing personal injury, operating a motor vehicle without a license, and operating so as to endanger. He was sentenced to serve a term of four to six years on the manslaughter indictment with the remaining charges placed on file.

The defendant unsuccessfully appealed his conviction to the Supreme Judicial Court of Massachusetts. *Commonwealth* v. *LaFrance*, Mass. Adv. Sh. (1972) 177, 278 N.E. 2d 394 (App. F).

On or about September 27, 1972, LaFrance filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts (App. G).

The Commonwealth filed a motion to dismiss and return on or about October 6, 1972.

A hearing on the motion to dismiss was held before the magistrate on November 13, 1972. On January 22, 1973, the magistrate recommended that the motion to dismiss be granted (App. E).

A hearing on the magistrate's recommendations was held before the District Court on June 11, 1973. Judgment granting the writ was entered on October 9, 1973 (App. C). A hearing on the Commonwealth's motion to stay was held on October 10, 1973, and denied by the District Court that same day (App. D).

On October 10, 1973, the Commonwealth filed a notice of appeal from the order and judgment of the District Court and, on October 11, 1973, filed a motion for stay in the court below. A hearing on the Commonwealth's motion was held on October 16, 1973, and the motion was denied (App. B).

On June 28, 1974, the Court of Appeals remanded the case to the Massachusetts court, "so that a hearing on the issue of coercion may be held there."

The Commonwealth of Massachusetts now petitions to the Supreme Court of the United States for a writ of certiorari to review that decision.

Argument.

I. Access to the Federal Writ of Habeas Corpus must be Denied a State Prisoner where he has Failed to Exhaust Available State Remedies.

LaFrance, in applying for the federal writ, staked his claim upon an evidentiary matter that developed during his criminal trial after the prosecution sought to impeach the testimony of a government witness by the use of prior contradictory statements.

> "The prosecution's use of the typed statement as the factual basis for leading questions and as a prior inconsistent statement violated the petitioner's right to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States because the prosecution failed to show and the trial court failed reliably to determine that the contents of the statement had been given voluntarily by Richard Brown to the police." (Petition for Writ of Habeas Corpus, VIII, App. G.)

In developing an exhaustion argument it is important to compare recognized exclusionary procedures, available to the defense at time of trial, with those which counsel actually exercised in an effort to challenge the testimony in question.

The courts of the Commonwealth have established procedures to suppress out-of-court confessions allegedly coerced from a defendant and sought to be used against him at trial. The Massachusetts, or "Humane" Rule, was explained in *Jackson* v. *Denno*, 378 U.S. 368, 417 (1964):

> "[The j]udge hears all the evidence and rules on voluntariness before allowing [a] confession into evidence; if he finds the confession voluntary, [the] jury is then instructed that it must also find that the confession was voluntary before it may consider it."

A motion to suppress, filed in advance, is the recognized method used to challenge inadmissible evidence before its presentation at trial. However, if the opportunity did not exist or the defendant was unaware of the grounds, his rights will be saved if the matter arises during the course of trial. Massachusetts Superior Court Rule 101B; *Commonwealth* v. *Cooper*, 356 Mass. 74, 78-79 (1969). The defendant has the burden of proof in a motion to suppress,

Commonwealth v. *Cohen,* Mass. Adv. Sh. (1971) 449, 455, 268 N.E. 2d 357, and he must show that the evidence was illegally obtained. *Commonwealth* v. *Mitchell,* 350 Mass. 459, 464 (1966).

The transcript of *Commonwealth* v. *LaFrance* is devoid of any entry indicating an attempt by the defendant to suppress the witness Brown's testimony (Tr. 136-179). Since the trial record fails to reflect any motion to suppress having been made, it must be presumed that the defendant did not utilize this particular method to challenge proceedings he now claims were conducted in violation of his rights.

When prejudicial evidence is initially offered, or its introduction seems imminent, the adversary may require a determination of admissibility before it is submitted for consideration by the trier of fact. There is no record in the pages reporting Brown's testimony that counsel requested a voir dire concerning any part of that testimony. *Commonwealth* v. *Stanley,* Mass. Adv. Sh. (1973) 249, 250-251, 292 N.E. 2d 694. In fact, throughout the forty-three pages recounting Brown's examination, counsel took only five exceptions to the court's rulings (Tr. 145, 146, 154, 172, 178). The first four exceptions were taken after the court declined to entertain counsel's general objections to questions directed to Brown in an effort to impeach his credibility by the use of prior inconsistent statements. The last exception was taken after the court refused to consider defendant's motion to strike "the vast majority" of Brown's testimony (Tr. 178). The transcript is devoid of a single attempt by the defense to foreclose the jury from hearing any portion of Brown's testimony. The defendant requested no instructions relating to the voluntariness of Brown's statements.

Since the issue of a voluntariness hearing for the witness's testimony was never raised at the trial, it may not

properly be presented to a reviewing court,[1] and it is far too late to create issues in federal habeas corpus proceedings that were never brought to the trial court's attention. *Grieco* v. *United States*, 435 F. 2d 677 (7th Cir. 1970). The petitioner presented a new claim to the district court, which must first have been made in the state court under procedures that amply provide such a method of redress. *Subilosky* v. *Massachusetts*, 412 F. 2d 691 (1st Cir. 1969). Until he did so, the defendant failed to exhaust available state remedies. *Needel* v. *Scafati*, 412 F. 2d 761 (1st Cir. 1969); *Picard* v. *Connor*, 404 U.S. 270, 92 S.Ct. 509 (1971).

Despite the mandate of 28 U.S.C. 2254(b), requiring the applicant affirmatively to demonstrate that further relief is unavailable in the state courts, the court below affirmed the District Court's finding that LaFrance had exhausted his available state remedies.

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[1] Counsel admitted before the District Court Judge that the Massachusetts Supreme Judicial Court's opinion does not comment upon the voluntariness issue that petitioner sought to present to the District Court. See *Transcript of Hearing*, before Tauro, D.J., June 11, 1973, pp. 13-14.

"THE COURT: Do you have a copy of the SJC opinion with you by chance?

"MR. WHITESIDE: I do.

"THE COURT: Do they deal with this question?

"MR. WHITESIDE: No, not really.

"THE COURT: The question of a judge having to review the voluntariness?

"MR. WHITESIDE: No. They don't deal with that at all.

"THE COURT: Did you argue it?

"MR. WHITESIDE: I argued it in my brief. I don't remember personally if I argued it orally or not; but essentially I thought this case was a sufficiency-of-evidence case as the best issue, because I consider, obviously wrongly at this point, that there was really no evidence at all.

"THE COURT: Without my having read this, the opinion is silent on the question of the determination of voluntariness?

"MR. WHITESIDE: Yes, silent. . . ."

"The district court . . . rejected, as do we, the Commonwealth's contention that LaFrance did not exhaust state remedies. Although the opinion of the Supreme Judicial Court dealt mostly with state law issues, LaFrance's brief before the court raised, if secondarily and without much focus, the relevant federal claims. Both *Jackson, supra,* and *Sims* v. *Georgia,* 385 U.S. 538 (1967), were cited, and LaFrance specifically complained of the court's neglect 'even to inquire whether the statement had been voluntarily made.'" (App. A, p. 30.)

It is well settled that exhaustion of state remedies is a prerequisite to federal habeas corpus jurisdiction. 28 U.S.C. 2254(b). The court below erred in finding that LaFrance had exhausted his available state remedies while at the same time holding that the Massachusetts court had not passed upon the very issue now in question.

"But the Massachusetts courts have never passed on a procedure involving a statement other than a confession. It may be that they will not wish to extend the confession rule to statements by witnesses. That decision, in any event, is not for us to make." (App. A, p. 38.)

In effect, the court below has nullified the exhaustion doctrine by rendering a decision upon the merits of the case. Respect must be accorded principles of procedure by following their mandate if they are to retain any significance.

"Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, un-

> less the aggrieved party in this Court can affirmatively show the contrary [citations omitted]." *Street* v. *New York,* 394 U.S. 576, 582 (1969).

Adequate post-conviction remedies exist in this Commonwealth whereby a prisoner may challenge the propriety of the criminal proceedings that determined guilt. *Needel* v. *Scafati,* 412 F. 2d 761, 765 (1st Cir. 1969), cert. denied, 396 U.S. 861 (1970).

If it appears to a judge of the Superior Court that "justice may not have been done," he may grant a motion for a new trial at anytime. Mass. Gen. Laws, c. 278, § 29. This procedure provides a general means of post-conviction relief where issues of a constitutional nature may be alleged. The defendant also retains the right to a full review by the state's highest court from an adverse decision on the motion for new trial. *Earl* v. *Commonwealth,* 356 Mass. 181, 183 (1969).

LaFrance has not shown that this remedy was not available to him at the time he sought relief in the federal court. *Henry* v. *Tinsley,* 344 F. 2d 109, 110 (10th Cir. 1965). He has no right to anticipate that the court will determine his alleged errors are without substance. *United States ex rel. Calhoun* v. *Pate,* 341 F. 2d 885, 886 (7th Cir. 1965). Anticipation of a judicial result cannot be established if no attempt is made to obtain that relief. *Morehead* v. *State of California,* 339 F. 2d 170 (9th Cir. 1964).

A writ of error is recognized in Massachusetts as a means of obtaining review by the Supreme Judicial Court of a judgment of conviction and a determination of an alleged federal constitutional question. Mass. Gen. Laws, c. 250, §§ 1, 2, 9, 10. The court has offered words of guidance for those seeking such relief, *Delle Chiaie* v. *Commonwealth,* 353 Mass. 771 (1968), and has recognized the expanding

scope of the common law writ to "meet evolving constitutional principles." *Cortelesso* v. *Commonwealth*, 354 Mass. 514, 521 (1968). In its discretion, the court may consider issues on a writ of error not raised in the normal course of direct appellate review. *McHoul* v. *Commonwealth* Mass. Adv. Sh. (1974) , 312 N.E. 2d 539, 542.

It is recognized that a federal district court does have the jurisdictional power to entertain a petition for a writ of habeas corpus by a state prisoner seeking the vindication of alleged violations of constitutional rights even though, initially, that claim has not been presented to the state's highest court for review. *Townsend* v. *Sain*, 372 U.S. 293 (1963). Nevertheless, considerations of comity and the proper balance of state and federal interests demand that this power be exercised in a manner consistent with the view that state courts should, in the absence of exceptional circumstances, first be given the opportunity to correct errors in their own proceedings. 28 U.S.C. 2254(b).

> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. 2254(c).

Without determining that exigent circumstances were present, the District Court improperly accepted jurisdiction over the LaFrance petition in direct repudiation of the very statute limiting that power. The court below, by sustaining the action of the District Court, compounded the error and subverted the plain meaning of words, universally understood and devoid of any ambiguity, to an interpretation and result never intended nor authorized by Congress.

II. The Court Below Erred in Determining that the District Court Acted Properly when it Issued the Writ of Habeas Corpus and Discharged LaFrance from Custody Without According the Commonwealth an Opportunity to be Heard on the Merits of the Case.

On or about September 27, 1972, a petition for a writ of habeas corpus was filed in the District Court (App. G). The Commonwealth filed a return and a motion to dismiss on October 6, 1972. This latter pleadings alleged "the petition failed to state a claim upon which relief may be granted," that the "[p]etitioner has failed to exhaust his available state remedies," and "[t]he petition does not state concisely and with substantial certainty the sufficient facts necessary to constitute the cause of action."

On October 30, 1972, the lower court referred the case to the magistrate. A "Notice of Hearing" on the motion to dismiss was sent and a hearing on the motion to dismiss was held. The magistrate recommended that the motion to dismiss be granted (App. E).

A "Notice of Hearing on Magistrate's Recommendations" was sent to the parties; the defendant requested a continuance; a new notice of "Hearing on Memorandum, Findings, and Recommendations of the U.S. Magistrate" was sent to the parties; and a hearing on the magistrate's recommendations was held June 11, 1973.

In his introductory remarks at this hearing, counsel for the defendant informed the court that the matter before it was based upon the motion to dismiss and the magistrate's recommendations that the petition be dismissed.[2]

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[2] Hearing before the District Judge on June 11, 1973, p. 2.
"The Court: You represent the Petitioner, I take it?
"Mr. Whiteside: Yes, I do. Essentially, this is the Commonwealth's motion to dismiss and the Magistrate's, Magistrate Princi's recommendation that it be dismissed."

The Commonwealth stated to the court that its argument would be concerned with the motion to dismiss and the magistrate's recommendations that the court dismiss the petition.[3]

After argument, the defendant requested "that the findings of the Magistrate be affirmed as to exhaustion and that a hearing be ordered on the merits" (H.Tr. 24). Arguments of counsel were then taken under advisement (H.Tr. 25).

On July 11, 1973, the District Court requested, by letter, that the defendant supply a copy of the state court trial transcript to that court. The opinion of the District Court and order releasing defendant were issued October 9, 1973 (App. C).

Based upon all the aforementioned correspondence as reflected in the docket entries, coupled with the understanding of the parties as revealed by the hearing transcript, it becomes readily apparent that no hearing was ever held on the merits of LaFrance's claim.

The action of the District Court in releasing a prisoner whose conviction has been affirmed by the state's highest court without granting the respondent a hearing on the merits has denied the Commonwealth due process of law.

A motion to dismiss attacks the sufficiency of the petition; all the material allegations are assumed to be true. *Cruz* v. *Beto*, 405 U.S. 319, 322 (1972). The moving party may not offer evidence to controvert facts well pleaded on the face of the petition on a motion to dismiss. It is a restrictive pleading to test the material facts and determine if a legal wrong has been shown. The burden is upon the moving party affirmatively to demonstrate that the petition lacks substance and is ripe for dismissal.

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[3] References to the hearing before the District Judge on June 11, 1973, are cited as *Hearing Transcript* (H. Tr.).

Once a motion to dismiss has been denied, the burden is upon the petitioner to plead his cause and both parties may offer evidence to substantiate their respective positions. The issues have been joined and the facts in controversy may be examined by the court on their merits. To deny either party a right to be heard violates the basic concept of justice. Despite the highest intentions of the court, it may not peruse through matters not in evidence and assume the role of advocate by selecting parts to frame a judgment.

In the instant case, the Commonwealth was denied an opportunity to demonstrate contradictions within the trial court transcript directly bearing upon witness Brown's credibility. It is well settled that a reviewing court may not consider issues of fact generated by testimonial conflict.[4]

A review of the trial transcript reveals that the judge observed that the witness Brown testified in such a manner as to create a reasonable presumption that he committed perjury and ordered Brown "to recognize with surety for appearance to answer to an indictment for perjury" (Tr. 288). Later, Brown entered a plea of guilty to the aforementioned indictment for perjury arising out of the testimony that the defendant now claims has prejudiced his case.

Perhaps, if this important matter had been brought to the attention of the lower court at an earlier date, a different determination might have issued.

Nothwithstanding the subsequent developments, the fact remains that the Commonwealth was not given an opportunity to present evidence to controvert the allegations contained in the petition. The Commonwealth's rights

[4] A more intensive development of this concept may be found in Argument IV contained within the Commonwealth's brief.

have been violated. "A party's day in court should not have to begin in the court of appeals." *United States* v. *Andrews*, 462 F. 2d 914, 918 (1st Cir. 1972). See *Rozecki* v. *Gaughan*, 459 F. 2d 6, 7 (1st Cir. 1972).

The court below erred when it dismissed the Commonwealth's argument with an unspecified declaration:

> "The district court did not err in not itself holding an evidentiary hearing on voluntariness" (App. A, pp. 38-39).

III. The Court Below Erred in Determining that LaFrance had Stated a Federal Question.

A. *A Defendant Lacks Standing to Suppress the Statements of Another.*

LaFrance contends that he was entitled to a determination that Brown's statement to the police was voluntary before it could be introduced for impeachment purposes in the jury's presence. Assuming that the defendant had made such a request at the trial and further assuming that the defendant had prior knowledge that the witness would recant earlier statements, the defendant lacked standing to suppress another's statements.

The determination by the court below that "there is no standing problem" is unprecedented.

> "LaFrance is not complaining of the purported denial of Brown's constitutional rights, but only of his own." (App. A, p. 37.)

In *Turner* v. *Pennsylvania*, 338 U.S. 62, 65 (1949), this Court recognized that a standing problem existed in a situation closely analogous to this case, but declined to decide the issue.

The prevailing rule of law is quite clear: only the person making the statements may request their exclusion. The claim of the privilege against self-incrimination is personal and may only be invoked by the aggrieved party who uttered the words. *United States* v. *Schennauli,* 429 F. 2d 852, 855 (7th Cir. 1970). A defendant may not be subrogated to the constitutional rights of a third party. *United States* v. *Pruitt,* 464 F. 2d 494, 495 (9th Cir. 1972). A defendant should not be permitted to claim a constitutional protection unless he belongs to the class for whose sake the protection was given. *Jones* v. *United States,* 362 U.S. 257, 261 (1960).

B. *The Existence of a Federal Constitutional Question is a Prerequisite for Jurisdiction in Habeas Corpus Proceedings.*

The rule in federal proceedings, unlike state practice, creates a presumption that the court lacks jurisdiction over the subject matter until it is demonstrated that in fact it exists. *Martin* v. *Wyzanski,* 262 F. Supp. 925 (D. Mass. 1967). The burden, therefore, rests upon the petitioner to show the court that he has presented a federal question for its consideration. Just what constitutes a federal question is a rather elusive matter. However, Congress has clothed this spectre with meaning in 28 U.S.C. 2254(a), when it restricted the federal courts from entertaining applications for the writ from state prisoners unless the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." Not every procedural error, but only those so flagrant as to result in an unfair trial, permit attack by habeas corpus. *Eagles* v. *United States ex rel. Samuels,* 329 U.S. 304, 311-312 (1946).

The court below dismissed the Commonwealth's justiciability argument with the observation that, "the due

process requirements of a fair trial clearly extended to matters dealing with a witness's credibility." (App. A, p. 35.) This, the Commonwealth is unwilling to concede. The impeachment of Brown, which LaFrance now seeks to raise to a constitutional level, is purely a question of evidence.

The Commonwealth had made a promise to the jury in its opening remarks:

> ". . . that Mr. Brown gave them a statement; and we will expect that he will testify so in court; that on this particular day he and Peter LaFrance, the defendant, went in a stolen automobile to Attleboro.
>
> "When they got to Attleboro, they weren't able to do what they had gone for, and started back towards Taunton.
>
> "As they started back towards Taunton, Mr. Brown will tell you that he fell asleep; and the next thing, you know, he woke up; he heard a bump and a scrape, and he woke up; and he said to Mr. LaFrance, the operator of the car, 'Hey, you hit somebody.'" (Tr. 7.)

A jury expects the Commonwealth to keep its promise. If the prosecutor fails to produce the anticipated evidence at trial, the jury may reflect their disbelief in his veracity by their verdict.

When a prosecution witness repudiates his prior statements while on the stand and in so doing creates an alibi for the defendant, the Commonwealth must use every legitimate impeachment technique to force the truth from the witness or prove him to be a liar.

> "Furthermore, there was no error in allowing the Commonwealth to introduce Brown's statement for impeachment purposes. [Citation omitted.] In com-

pliance with the requirements of G.L. c. 233, § 23, the witness was fully apprised of the time, place and content of the prior statement, and was given full opportunity to explain it. The jury were clearly instructed that they were to consider this only as affecting the witness's credibility." *Commonwealth* v. *LaFrance*, Mass. Adv. Sh. (1972) 177, 180 (App. F, pp. 78-79).

The trial court charged the jury on the nature of the impeaching questions thrice during the course of the trial.

> "This testimony goes to the credibility that you will attach to his story. In other words, you can consider if he has made prior inconsistent statements or a different statement that is about to be read to you, different from what he says here. It goes to the question of whether he is withholding evidence or otherwise incredible." (Tr. 150.)

Later, when counsel requested special instructions, the court replied:

> "I have already done it. I have told the jury inconsistent statements go to the amount of credibility that you will attach to this particular winess's testimony.
>
> "In other words, if he says something today and something different entirely tomorrow, it may warrant an inference that he either isn't telling the truth or he is misunderstanding things.
>
> "It is no evidence of the substantive crime itself." (Tr. 178.)

Counsel then thanked the court for this latter instruction after learning that the judge could give no other (Tr. 179). The trial judge re-emphasized the difference between substantive evidence and statements used for impeachment purposes in the court's final instructions to the jury.

"Now during the course of the trial, the witness Brown was shown a signed statement; and I admitted it for your consideration upon this limited issue: To effect the credibility, if it did effect it, of the witness Brown.

"Brown told a story on direct examination. On cross-examination he was shown a statement that he was alleged to have made, which was entirely, or was or may be said to be different.

"I admitted the second statement as bearing upon his credibility.

"In other words, if A says something today, and tomorrow says something about the same subject entirely different—that fact may convince you or show you that whatever he said wasn't worth believing. And that's the only reason that I admitted it.

"Whatever was in that second statement is no evidence of the truth of what's in it. It is for you to say, having in mind what I have said on that score." (Tr. 281.)

It does not appear in the trial transcript that counsel objected to any portion of the final charge to the jury, neither does the transcript reflect that the defendant requested the court to instruct the jury in any particular manner for the final charge.

The Fourteenth Amendment to the Federal Constitution was never conceived as a method to deprive the states of reasonable means to assure that the guilty are brought to justice. The states are free to provide such criminal procedures and rules of evidence as they choose, provided that they do not infringe upon the rights insured by the Constitution. *Burgett* v. *Texas*, 389 U.S. 109, 113-114 (1967). The provisions of the Due Process Clause only restrain arbitrary and unreasonable abuses of power which are not

within the lawful state power to exert because they injustly diminish or destroy fundamental rights. *American Land Co.* v. *Zeiss*, 219 U.S. 47, 66 (1911). All that is required of the Due Process Clause is that the defendant be given the opportunity to challenge evidence received in open court, to cross-examine witnesses, and to rebut the prosecution, which has the burden of proving guilt beyond a reasonable doubt. *Benoit* v. *Gardner*, 351 F. 2d 846 (1st Cir. 1965).

A constitutionally unfair trial results when the barriers and safeguards are so relaxed or forgotten that the proceeding becomes a spectacle or trial by ordeal rather than a disciplined contest. *United States* v. *Augenblick*, 393 U.S. 348, 356 (1969). Although the defendant is entitled to a fair trial, he is not guaranteed a perfect one. *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953); *Harney* v. *United States*, 306 F. 2d 523, 534 (1st Cir. 1962), cert. denied, 371 U.S. 911 (1962).

Both the District Court and the Court of Appeals appear to rely upon a case decided by the California Supreme Court, *People* v. *Underwood*, 37 Cal. Rptr. 313, 389 P. 2d 937 (1964), to lend substance and support to the proposition that a witness's testimony must be subjected to a voluntariness hearing before it becomes admissible for impeachment.

The case presently before this Court and *Underwood* are quite inapposite. In the latter case, the witness testifying for the prosecution also made inconsistent statements; however, a hearing was held without the jury present where the witness testified that his prior statement was the result of coercion by the police. This evidence of coercion remained uncontradicted by the prosecution. 389 P. 2d 939. The court then permitted the prior inconsistent statement to be used for impeachment purpose but did not

instruct the jury to consider the voluntary nature of the statement. See *United States* v. *Curry*, 358 F. 2d 904, 912 (2nd Cir. 1965).

The *Underwood* court found the evidence of that defendant's guilt sharply conflicting. This finding, combined with the alleged error, permitting the witness's coerced statement to be heard by the jury, resulted in a miscarriage of justice. 389 P. 2d 944.

No similar factual circumstances are to be found in *Commonwealth* v. *LaFrance*.

A situation more closely analogous to the issue presented in the instant case is contained in *State* v. *Paul*, 83 N.M. 619, 495 P. 2d 797 (1972), wherein the witness testified that his statement was obtained by coercion. On cross-examination by the prosecution, the "coerced" statement was used to impeach the testimony given by the witness on direct examination. Subsequently, the statement was admitted into evidence for impeachment purposes. Unlike LaFrance, the defendant argued that the statement in question should have been subjected to a voluntariness hearing according to the teachings of *Jackson* v. *Denno*, 378 U.S. 368 (1964).

The New Mexico court dismissed this contention with the observation that *Jackson* v. *Denno* does not apply since it only requires a hearing to determine the voluntariness of a confession made by the accused, and not a statement made by a witness. 495 P. 2d 797.

At LaFrance's trial, counsel did not request a voir dire to determine voluntariness and did not attempt to cross-examine Brown to bring uncontradicted elements of coercion, if any, to the jury's attention. See *United States ex rel. Portelli* v. *LaVallee*, 469 F. 2d 1239 (2d Cir. 1972), cert. denied, 411 U.S. 950 (1973). He also failed to introduce any evidence that would show that methadone is a drug that has the property of overcoming a person's will.

Not only were Richard Brown's statements concerning alleged threats made by the police incredible (Tr. 155), but they were directly contradicted by testimony from the officers (Tr. 181).

The writ of habeas corpus was never intended to place a judge of the federal court at counsel table and retrospectively guide the defense through every evidentiary and procedural complexity that arose during the criminal trial.

> "There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934).

This Honorable Court recently held that a confession tainted by illegality may be used to impeach a defendant if it satisfies the requirement of trustworthiness. *Harris* v. *New York*, 401 U.S. 222 (1971). Here, unlike *Harris* it was not the defendant's statement that was used, but that of a prosecution witness. LaFrance should not be permitted to argue that the statement of a mere witness should be accorded higher safeguards than those of the defendant. See also *Walder* v. *United States*, 347 U.S. 62, 65 (1954); *Lewis* v. *Yeager*, 411 F. 2d 414 (3d Cir. 1969); *United States ex rel. Portelli* v. *LaVallee*, 469 F. 2d 1239, 1240 (2d Cir. 1972).

The court below, in granting LaFrance's request, established a new standard of law regarding impeachment proceedings by the use of prior inconsistent statements where allegations concerning their voluntary nature have been made. In effect, that court has exerted a superintendency

power over the Massachusetts judicial system. The court below has imposed its theory of justice based upon a strained interpretation of the Federal Constitution and created a new rule of practice from an issue of law that was never raised at trial and never properly presented to the state's highest court.

IV. Assuming Arguendo that the Court Properly Reached the Merits of the Allegations Contained in the Petition, the Court Below Erred in Ruling that The Petitioner had been Denied Due Process of Law During the Course of the State Trial which Resulted in his Conviction.

Petitioner's Due Process Claim.

LaFrance alleges that:

> "The prosecution's use of the typed statement as the factual basis for leading questions and as a prior inconsistent statement violated the petitioner's right to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States because the prosecution failed to show and the trial court failed reliably to determine that the contents of the statement had been given voluntarily by Richard Brown to the police." (Petition for Writ of Habeas Corpus, VIII, App. G, p. 84.)

The defendant predicated the aforementioned allegations upon the supposition that Brown's statements were in fact involuntary. This assumption the Commonwealth emphatically denies. Testimony was developed during the course of the state trial that contradicts Brown's self-serving affirmations of involuntariness.

Richard Brown, while on the witness stand, was questioned by the prosecution about the circumstances surround-

ing his inculpatory statements. He was asked if any promises had been made to him. Brown answered, "I wouldn't say promises as much as I say threats." (Tr. 150.) When asked about threats that were made to him, Brown responded that the officer said, "If it took a million years, he would see me swing for this." (Tr. 151.) Brown observed that the threat was repeated "several times," in the presence of "other police officers." (Tr. 151.) When asked if any of these officers were present in the courtroom, Brown stated that the threat was whispered to him by the officer and, "I don't think anybody could have heard it." (Tr. 152.)

While the judicial concept, "traditional indicia of coercion" is expansive by its very nature, it has yet to be interpreted to include "whispered threats."

Brown also alleges that he had been "doing dope" on the day he made the inculpatory statement (Tr. 155), and during the questioning by the police, he testified, "My mind was going crazy." (Tr. 155.) The officer who was present during the questioning stated Brown's physical condition appeared normal and he did not make any physical complaints at that time (Tr. 181).

In review, the reader may observe that evidence of threats made to Brown is incredible and facts demonstrating that Brown's will was overcome by the debilitations of "doing dope" are not only insufficient, but also contradicted. If the defendant wished to pursue the matter of voluntariness, he could have pressed the issue on cross-examination. The defendant chose not to cross-examine Brown. (Tr. 179.)

Brown's credibility as a witness was to be determined by the jury based upon all the evidence in the case. *United States* v. *Haili*, 443 F. 2d 1296, 1299 (9th Cir. 1971). A conflict in testimony is not the concern of the state review-

ing court nor can it be a matter properly before the federal court when raised by one seeking habeas corpus relief.

It is well settled that a federal court, in reviewing state convictions, will not consider "issues of fact." These "issues of fact" are conclusively determined by the state courts. In *Watts* v. *Indiana,* 338 U.S. 49, 51-52 (1949), the Court found:

> "In the application of so embracing a constitutional concept as 'due process', it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflicts comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here."

Since all testimonial conflict is settled by the judgment of the state courts, findings of fact, supported by evidence, form the basis for review by the federal court. When a state criminal court has applied the proper constitutional standards, all conflicts in testimony bearing on that claim have been resolved. "In such instances, we consider only the uncontested portions of the record: the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted." *Culombe* v. *Connecticut,* 367 U.S. 568, 604 (1961). See *Clewis* v. *Texas,* 386 U.S. 707, 708 (1967).

V. Whether the Court of Appeals Properly Remanded the Case to the State Court.

The court below has ordered the case returned to the state court for a hearing on the issue of coercion (App. A, p. 38). That ruling was conditioned upon the determination that:

> ". . . there is a substantial claim by the defendant that the impeaching statement offered by the government was obtained by police threats and other blatant forms of physical and mental duress. Where such a claim is made, and supported by sworn testimony, the court has the duty to conduct its own inquiry and to exclude the statement if found to have been unconstitutionally coerced." (App. A, p. 37.)

The "substantial claim" quickly dissipates in light of the evidence hereinbefore described which directly contradicts the dubious testimony concerning coercion which had been elicited as a result of questioning by the court.

The fact that the defendant waived his right to cross-examine the witness, apparently relinquishing this task to the court, is an influential factor to be considered in determining whether the hearing conducted by the judge was sufficient to meet the requirements the court below now intends to impose.

Simply because the questioning of the witness occurred in the presence of the jury, does not create a presumption of impropriety. This Court has never held that all voluntariness hearings must take place in the jury's absence. *Pinto* v. *Pierce*, 389 U.S. 31, 32 (1967). Since counsel never objected to the judge's interrogation of Brown and actually received the benefits of the exchange, the object for which remand has been ordered has already been accomplished.

Without more, it would be fair to conclude that a judge would not permit the jury to consider statements that he found were involuntarily made, *Lego* v. *Twomey*, 404 U.S. 477, 484 (1972); however, here the judge, after listening to the witness, ordered that Brown be bound over to the grand jury for a determination of what the trial court considered perjury testimony. The observations of the trial judge were supported by that accusatory body when an indictment was returned charging Brown with perjury arising out of the very testimony in which he claimed his statement was coerced. The reasonableness of the court's actions was sustained when Brown entered a plea of guilty to the perjury indictment.

LaFrance should not be afforded another opportunity to relitigate that which has already been conclusively determined—Brown lied.

Conclusion.

For the reasons stated above, it is respectfully submitted that the questions presented for consideration are substantial and that the court below has so far departed from the accepted and usual course of judicial review that a petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals for the First Circuit.

No. 73-1327.

PETER F. LaFRANCE,
PETITIONER, APPELLEE,
v.
GEORGE H. BOHLINGER III, ETC.,
RESPONDENT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Bernard Manning, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, and *David A. Mills*, Assistant Attorney General, Chief, Criminal Appellate Section, were on brief, for appellant.

Alexander Whiteside II, by appointment of the Court, with whom *Putnam, Bell & Russell* was on brief, for appellee.

June 28, 1974.

CAMPBELL, *Circuit Judge*. The main question on appeal is whether a state judge committed constitutional error when he permitted the district attorney to use a witness' prior statement to the police to impeach the witness without a judicial inquiry into its voluntariness and without in-

structing the jury to pass on its voluntariness. *Cf. Jackson* v. *Denno,* 378 U.S. 368 (1964). The district court ruled that the trial judge's treatment of the statement, which implicated the accused as well as the witness in the crimes for which the former was on trial, violated the right of the accused to due process of law. Massachusetts contends that the *Jackson* requirements apply only to confessions of an accused, and that procedures required in that case should not be extended to the prior statements of a witness.

The accused, LaFrance, petitioned in the district court for a writ of habeas corpus, and this appeal is from allowance of the writ. He sought release from a Massachusetts correctional institution where he was confined after convictions for manslaughter, leaving the scene of an accident, and operating a motor vehicle without a license and so as to endanger. The facts are set forth comprehensively in the district court's opinion, 365 F. Supp. 198 (D. Mass. 1973), as well as in the earlier Supreme Judicial Court opinion, affirming La France's state conviction, 1972 Mass. Adv. Sh. 177, 278 N.E. 2d 394. We thus restate only the most essential facts.

LaFrance was indicted for the hit and run death of Paul Butler, who had been struck by a speeding car while standing on the side of the road. Neither the car nor its occupants were identified at the time, and the car itself was never found. At a jury trial in the Superior Court the prosecution presented evidence that LaFrance was aware of the accident suspiciously soon after it had occurred, that he had attempted to get the people whose apartment he had been visiting to provide a false alibi, and that he had admitted guilt in a telephone call to one Wendall Frost. By itself, this evidence was legally sufficient to convict, as the Supreme Judicial Court found. *Commonwealth* v. *LaFrance, supra,* 278 N.E. 2d at 396.

In defense LaFrance took the stand to deny having left the apartment that evening, a complete alibi if believed. Earlier La France's companion, Richard Brown, who was called as a government witness, had likewise testified that he and LaFrance remained at the apartment all evening. However, the prosecutor had shown Brown a typed statement which Brown acknowledged having signed at the police station. In the statement Brown recounted that LaFrance and he had left the apartment, climbed into a stolen car and, with LaFrance driving, had struck something.

With the court's permission, and over the objections of the defense, the district attorney led and vigorously examined Brown with respect to the contents of the statement. When asked why, in light of his current testimony, he had said what he did, Brown replied that officer Dale Clark had threatened him; he testified that the statement was, in effect, a police fabrication signed because he was strung out on drugs, frightened, and willing to say anything to get back to his cell. Brown denied that the statement was given of his own free will, and persisted in maintaining that it was false. [1]

The court advised the jury that the statement was to be regarded solely to determine whether Brown's testimony was truthful and not as evidence that LaFrance had committed the crimes charged. The officers present when Brown gave the statement also testified, asserting that Brown provided all the details, seemed "normal", and made no physical complaints, although he "broke down and shook and wept; and said he thought this whole thing was a dream."

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[1] Brown's full testimony, which we do not repeat, concerning his physical and mental condition at the time he gave the statement was accurately summarized by the district court, *see LaFrance v. Bohlinger*, *supra* at 201-203.

The district court decided three issues. First, it rejected, as do we, the Commonwealth's contention that LaFrance did not exhaust state remedies. Although the opinion of the Supreme Judicial Court dealt mostly with state law issues, LaFrance's brief before the court raised, if secondarily and without much focus, the relevant federal claims. Both *Jackson, supra,* and *Sims* v. *Georgia,* 385 U.S. 538 (1967), were cited, and LaFrance specifically complained of the court's neglect "even to inquire whether the statement had been voluntarily made."

Second, the district court rejected what it labelled the "confrontation contention", namely that LaFrance was deprived of the right to confront the witness against him when the contents of Brown's out of court statement were put before the jury. We agree that neither *Bruton* v. *United States,* 391 U.S. 123 (1968), nor *Douglas* v. *Alabama,* 380 U.S. 415 (1965), apply. In neither case could the witness whose prior statement was in issue be cross examined. Brown, to the contrary, was present and available for cross examination; he did not invoke his privilege against self-incrimination. There was no inability to confront. *Nelson* v. *O'Neil,* 402 U.S. 622 (1971); *California* v. *Green,* 399 U.S. 149, 162 (1970).

The final point raised before the district court was that Brown's inculpatory statement should not have been admitted, even for impeachment, without a determination that it was voluntary. The district court, equating the statement with a confession, held that it could not be admitted without a prior judicial determination of voluntariness and without submission of the issue of voluntariness to the jury. We agree that there was a sufficient factual issue concerning whether the statement was coerced to necessitate a prior judicial hearing, out of the jury's presence. But we do not agree that the constitution required the court to submit the issue of voluntariness to the jury.

In *Jackson* the Court emphasized that the Fourteenth Amendment forbade the use of an involuntary confession not only because of its probable unreliability but also,

> "because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.' " *Id.* at 386.

Indeed this, rather than emphasis upon presumed unreliability, was the rationale. Mr. Justice White, the author of *Jackson*, made this point unmistakably in *Lego* v. *Twomey*, 404 U.S. 477, 484-85 (1972):

> "We noted in *Jackson* that there may be a relationship between the involuntariness of a confession and its reliability. [footnote omitted] But our decision was not based in the slightest on the fear that juries might misjudge the accuracy of confessions and arrive at erroneous determinations of guilt or innocence. . . .
>
> "Quite the contrary, we feared that the reliability of even coerced confessions could impermissibly influence a jury's judgment as to voluntariness. The use of coerced confessions, whether true or false, is forbidden because of the method used to extract them offends constitutional principles. *Rogers* v. *Richmond*, 365 U.S. 534, 540-541 (1961). [footnote omitted] The procedure we established in *Jackson* was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances. Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions."

The rationale is important, because if the only infirmity of Brown's statement could be its possible unreliability,

we might well conclude that the jury was the proper party to pass on that. Use of the statement was limited to impeachment, which meant that the jury was supposed merely to regard it as an item of evidence against which to weigh Brown's current testimony. Deciding what weight to give evidence is a jury's traditional task. There is no reason to assume that a judge is better equipped.

But *Jackson* and *Lego* reject combining into a single jury question the issue of coercion and that of the statement's weight and reliability. They hold that the court (or a separate jury apart from the trial jury) must pass on voluntariness to make certain that decision on that question is not influenced by impressions of guilt or innocence. At stake is not "improving the reliability of jury verdicts", see *Lego, supra* at 486, but screening out evidence which, if found to be induced by coercion, is unacceptable regardless of its truth or untruth.

> "Due process of law requires that a coerced confession be excluded from consideration by the jury. It also requires that the issue of coercion be tried by an unprejudiced trier, and, regardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it. . . .The rule excluding a coerced confession is more than a rule excluding hearsay. . . . Morgan, Some Problems of Proof Under the Anglo-American System of Litigation (1956), 104-105." *Jackson, supra* at 382-83 n. 10.

At first blush, the same reasoning might seem equally applicable to any coerced statement, whether or not that of the accused. Nonetheless, we should not overlook some important differences, even where the statement, as here,

has many confession-like traits. The major differences are as follows:

1. An impeaching statement is not substantive evidence of guilt. A confession, on the other hand, is the most damning evidence against a defendant and therefore deserving, perhaps, of greater care before it is admitted.

2. Exclusion of involuntary confessions is a principle rooted in the common law. Although there have been many different rules, there has never been significant support for the use of confessions secured by outright coercion. There is no such clear legal tradition for the suppression of involuntary impeaching statements. Indeed, a few jurisdictions have permitted even involuntary confessions to be used for impeachment.[2] *See* III J. Wigmore, Evidence § 821 n.9 (Chadbourn rev. 1970).

3. It is clear that the exclusionary rule neither demands nor permits an absolute parallel between affirmative evidence and impeaching statements. *See Walder* v. *United States*, 347 U.S. 62 (1954). In *Harris v. United States*, 401 U.S. 222 (1971), the Court reaffirmed the distinction, holding that a confession received without *Miranda* warnings may be used to impeach a defendant who voluntarily elects to testify.

4. Arguably there is greater urgency for a hearing outside the jury's presence in confession cases. If an accused is not afforded such a hearing at which he can present evidence of coercion, he is forced to choose between remaining silent at his trial or taking the stand, thus opening himself to cross examination and impeachment. A witness such as Brown was faced with no such dilemma.

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[2] In *Commonwealth* v. *Kleciak*, 350 Mass. 679, 216 N.E. 2d 417 (1966), the court reversed its older holding that an involuntary confession could be used for impeachment.

5. Any extension of exclusionary rules and procedures tends to complicate trials, and may result in withholding important evidence from the jury. To add, except for very good reason, to the underbrush of legal technicalities at this time seems undesirable.

6. Finally, persons not themselves the victims of illegal government conduct typically lack standing to assert the constitutional rights of others. To the extent that only Brown's rights may have been violated, LaFrance should not be allowed to invoke vicariously an exclusionary rule. *Alderman* v. *United States*, 394 U.S. 165, 174 (1969); *United States* v. *Pruitt*, 464 F. 2d 494, 495 (9th Cir. 1972); *United States* v. *Schennault*, 429 F. 2d 852, 855 (7th Cir. 1970).

The foregoing list provides potent reasons not to treat a witness' impeaching statement like a confession. But we must also examine the other side of the coin.

It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case. This was the thinking of the *Jackson* court; and precisely because the jury's concern with convicting a guilty defendant might lead it to credit a coerced confession, the Court required a separate hearing. Yet methods offensive when used against an accused do not magically become any less so when exerted against a witness.

> "Due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. [footnote omitted] A conviction supported only by such a confession could be but a variation of trial by ordeal."

Malinski v. *New York*, 324 U.S. 401, 430-31 (1945) (Rutledge, J., dissenting). *See also Bradford* v. *Michigan*, 394 U.S. 1022 (1968) (Warren, J., dissenting from denial of certiorari); *Hysler* v. *Florida*, 315 U.S. 411, 423-24 (1942) (Black, J., dissenting). Involuntary confessions have been excluded both because of the danger of unrealiability and, more importantly, out of a sense of fundamental unfairness best expressed as the "deep-rooted feeling that the police must obey the law while enforcing the law". *Spano* v. *New York*, 360 U.S. 315, 320-21 (1959). *See generally Developments in the Law — Confessions*, 79 Harv. L. Rev. 935 (1966). Since a statement coerced from an accused is neither less trustworthy than one from a witness nor more offensive to society's sense of fairness, it would seem illogical invariably to require a *Jackson* hearing in the first case but never in the second.[3] *See People* v. *Underwood*, 61 Cal. 2d 113, 389 P. 2d 937 (1964) (en banc); *People* v. *Newman*, 30 Ill. 2d 419, 197 N.E. 2d 12 (1964). *Contra*, *State* v. *Paul*, 83 N.M. 619, 495 P. 2d 797 (1972); *People* v. *Bradford*, 10 Mich. App. 696, 160 N.W. 2d 373 (1968), *cert. denied*, 394 U.S. 1022 (1969). *See also* Comment, *The Right of a Criminal Defendant To Object to the Use of Testimony Coerced From a Witness*, 57 Nw. U. L. Rev. 549 (1962); Note, 58 Geo. L.J. 621 (1970).

The due process requirements of a fair trial clearly extend to matters dealing with a witness' credibility. In *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959), the Court said,

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered

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[3] The issue has been raised in federal cases, but not decided. *See, e.g., Turner* v. *Pennsylvania*, 338 U.S. 62, 65-66 (1949); *United States v. Wolfe*, 307 F. 2d 798, 801 (7th Cir. 1962).

liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."

The credibility of a key witness is often, as here, critical to the accused's case; effective impeachment helps the government.[4] The government would not violate *Napue* by offering a statement which it believes to be voluntary simply because a witness, in order to bolster a changed story, charges that he was intimidated by improper police tactics. But if the charge is stated under oath and a factual issue established, the court and the government may not simply brush it aside. The court has a duty to make an inquiry outside the hearing of the jury sufficient to satisfy itself that there is nothing to the claim; and should the charge be substantiated, it is wrong that the government benefit from the tainted evidence.

Neither the confession cases nor *Napue* deal with the exclusion of impeaching statements. But, in *Harris*, the Court was careful to point out that there was no claim that the confession had been coerced; its further insistence that the "truthworthiness" of an impeaching statement satisfy "legal standards" strongly implies that it would not favor the use of statements extracted by coercion.

[4] In the present case, Brown's statement was a major event in the trial. It easily could have affected the outcome. His claims, if believed, would establish that he was questioned for a long period of time, took drugs in the presence of his interrogators, was frightened and dazed, and eventually signed a statement known to himself and the police to be false. These claims have been denied both in government testimony at trial and in affidavits furnished to us; and we do not suggest that we accept Brown's version. Brown, indeed, has since pleaded guilty to a perjury charge stemming from his testimony in this case; and while it is not clear what testimony was perjured, his conviction obviously bolsters the government's, and diminishes LaFrance's, position.

Id., at 224. In a similar case holding that suppressed statements made in the absence of counsel could be used for impeachment, the Second Circuit also noted that it would be a different question if the prior admission were found to be unconstitutionally coerced. *United States* v. *Curry*, 358 F. 2d 904, 912 (2d Cir. 1965).

We conclude that although there is no absolute parallel between the exclusionary rule relative to confessions and that relative to impeaching statements of witnesses, there is a point at which the same considerations apply to both. That point has been reached here because there is a substantial claim by the defendant that the impeaching statement offered by the government was obtained by police threats and other blatant forms of physical and mental duress. Where such a claim is made, and supported by sworn testimony, the court has a duty to conduct its own inquiry and to exclude the statement if found to have been unconstitutionally coerced.[5] Its duty stems from "the concept of due process, which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part." *United States* v. *Toscanino*, No. 73-2732, slip op. at 3507 (2d Cir. May 15, 1974). We emphasize that our holding goes no further than this; it is not to be interpreted as making applicable the *Miranda* or even pre-*Miranda* rules inferring involuntariness from circumstances falling short of the grave misconduct here mentioned. Since our decision is premised upon the rationale that use of coerced testimony entails a violation of the defendant's due process right to a fair trial, there is no standing problem. LaFrance is not complaining of the purported denial of Brown's constitutional rights, but only of his own.

[5] We make no distinctions between placing the statement before the jury by leading questions, by reading its contents, or otherwise.

It does not follow that LaFrance had a federal constitutional right to have voluntariness also put to the jury. That contention is disposed of by *Lego, supra*, holding that there is no such right. In the case of confessions, Massachusetts has traditionally required voluntariness to be put to the jury if the court resolves the issue against the accused. But the Massachusetts courts have never passed on a procedure involving a statement other than a confession. It may be that they will not wish to extend the confession rule to statements by witnesses. That decision, in any event, is not for us to make.

Since voluntariness did not have to be put to the jury, a new trial is not inevitable. Rather the case should be returned to the Massachusetts court so that a hearing on the issue of coercion may be held there.[6] If the statement is found not to have been coerced, the prior judgment of conviction may stand. Otherwise the judgment should, of course, be vacated. The district court did not err in not itself holding an evidentiary hearing on voluntari-

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[6] In *Jackson* v. *Denno*, 378 U.S. at 395-96, the Court said:

"Obviously, the State is free to give Jackson a new trial if it so chooses, but for us to impose this requirement before the outcome of the new hearing on voluntariness is known would not comport with the interests of sound judicial administration and the proper relationship between federal and state courts. We cannot assume that New York will not now afford Jackson a hearing that is consistent with the requirements of due process. Indeed, New York thought it was affording Jackson such a hearing, and not without support in the decisions of this Court, [footnote omitted] when it submitted the issue of voluntariness to the same jury that adjudicated guilt. It is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence. But as to Jackson, who has already been convicted and now seeks collateral relief, we cannot say that the Constitution requires a new trial if in a soundly conducted collateral proceeding, the confession which was admitted at the trial is fairly determined to be voluntary."

ness. We leave to the district court pending completion of state proceedings the status of LaFrance, who has been released on bail.

As assistance in interpreting this decision, we add the following: In any except the most glaring case, we will not look with favor on claims of coercion not timely and expressly raised during trial.[7] Unless a serious factual dispute can be shown to exist, and one in which, if successful, the defense would be entitled to exclusion, no hearing at all is necessary. *Cf. Procunier* v. *Atchley*, 400 U.S. 446 (1970). Finally, when need for a hearing is established, the government's burden to prove an absence of physical or mental coercion is by a preponderance of the evidence. *Lego, supra.* In all except the most unusual case, we should anticipate that the court's duty of inquiry would require minimal interruption of proceedings.

Remanded for proceedings in accordance herewith.

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[7] While we do not today decide the question, we do not envisage that any new principle embodied herein will be given retroactive effect. *Cf. Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966); *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

APPENDIX B.

PETER F. LAFRANCE

v.

GEORGE BOHLINGER, Superintendent,
Massachusetts Correctional Institution at Norfolk.

No. 73-1327.

United States Court of Appeals,
First Circuit.

Argued Oct. 16, 1973.

Decided Oct. 17, 1973.

MEMORANDUM and ORDER

Appellee, serving a state felony sentence, was ordered released by the district court, 365 F. Supp. 198, upon his petition for habeas corpus. The district court denied the Commonwealth's motion to stay the execution of the writ pending appeal. A short while after the writ had issued, the Attorney General of Massachusetts filed in this court a motion for stay pending appeal. We granted a stay of several days, so as to have time to familiarize ourselves with the issues. Soon after, we learned that appellee had been released before his attorney or the state correctional authorities had learned of our brief stay order. The latter order has since expired, and a single judge of this court has held a hearing on whether to extend the stay until the appeal is decided.

We find a further stay to be unwarranted. Regarding the timing of the writ, much must be left to the sound discretion of the district judge. Here, the petitioner below had srved much, possibly most, of his state sentence. The court may have believed that to stay the writ pending ap-

peal, thus requiring him to serve months more of what it had found to be an unconstitutional sentence, would be too harsh, especially since he can be re-imprisoned if the appeal goes against him.

Without intending criticism of what was done, but solely as a suggested guide for the future, we comment on several aspects of the procedure below:

First, any confusion caused by the overlapping of our temporary stay and the issuance of the writ could have been avoided had the district court itself granted the Commonwealth a stay of several days sufficient to permit it to present to us its request for a stay pending appeal. We do not suggest that district courts should grant even brief "turn-around" stays when appeals are frivolous, or when justice requires that no further delay take place. There may well be cases where, if we knew something of the court's thinking in denying a stay, we would not feel it necessary to issue our own. However, if a case involves a constitutional issue of some difficulty and if, as here, the petitioner's conviction had been reviewed and approved at the highest level of the state judiciary, comity usually suggests the advisability of granting the state at least a short respite during which the Attorney General may approach the federal appellate court for a stay.

Second, when ordering issuance of a writ of habeas corpus in these circumstances, we would encourage district courts to consider carefully the advisability of requiring appellee to recognize formally in that court for the purpose of assuring his future availability to the state if the appeal is successful. At the very least, the court should satisfy itself, by making the necessary inquiry, that the released state prisoner will remain available while the appeal is being decided. If the state wins on appeal, it may rightfully expect the federal courts to have taken reasonable

precautions to ensure a return to custody of the former prisoner. If no bond is required, it will be helpful to this court, which almost invariably will be faced with a request for stay, if the district court will indicate in writing its reasons for thinking none is needed, so that we will not be in the dark when we are approached. The district court is closer to the facts of the case, and we will be spared an extended hearing on matters of which the trial court is already aware.

A single judge of this court has held a hearing. For reasons already mentioned, we see no need for a further stay. We do, however, condition our denial of a stay upon appellee's willingness to execute in this court a bond upon personal recognizance. Based upon the circumstances and the representations made at the hearing, we do not require appellee at this time to provide sureties or furnish security.

It is ordered that the motion for stay be, and the same hereby is, denied provided appellee executes a bond agreeing to his being recognized on personal recognizance pending completion of the appellant's appeal and agrees that he will remain within the District and Commonwealth of Massachusetts and answer all orders of this court. Said bond is to be filed with the clerk of this court by October 19, 1973

APPENDIX C.

OPINION.

October 9, 1973.

Petitioner, an inmate at M.C.I. Norfolk, seeks a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. He has been confined following convictions in the Superior Court on indictments charging manslaughter, leaving the scene of an accident after causing personal injury, operating a motor vehicle without a license and operating so as to endanger.

He is serving a term of four to six years on the manslaughter indictment. The other indictments were placed on file after trial. Petitioner unsuccessfully appealed his convictions to the Supreme Judicial Court of Massachusetts. *Commonwealth* v. *LaFrance*, 1972, Adv. Sheets, 177, 278 N.E. 2d 394.

The charges against the petitioner arose from an incident which occurred on October 6, 1970 at about 11:00 P.M. when one Paul Butler was struck and killed by an automobile. The facts and circumstances surrounding this incident are detailed in the Supreme Judicial Court's opinion. 1972 Adv. Sheets 177. By way of background it is sufficient to outline briefly certain events which occurred during the trial. These events will be discussed in greater detail as we analyze the legal issues presented by this petition.

A Richard Brown was called as a witness by the prosecution. Brown testified on direct examination that he had been with the petitioner at another's apartment at the time of the automobile accident in question. Following this testimony, the prosecutor showed Brown a typed statement which Brown acknowledged having signed on October 13,

1970 at the Taunton Police Station. In essence, the typed statement contradicted Brown's direct testimony concerning his and petitioner's whereabouts at or about the time of the October 6 automobile accident.

Over petitioner's objection and exception, the trial judge permitted the prosecutor to ask leading questions which essentially paraphrased the typed statement. Brown answered each of these questions in the negative, thereby refusing to recant his testimony as to where he and petitioner were on the night in question. Thereafter, the judge admitted the typed statement for the purpose of impeaching Brown's direct testimony.

During his direct examination, Brown stated repeatedly that the typed statement had not been made by him voluntarily. To the contrary, Brown testified that the statement was the product of suggestions and threats by the police at a time when he was suffering withdrawal from the use of drugs. The jury was present during the entire line of questioning involving this statement.

These events give rise to two contentions by the petitioner. The first is that by permitting the use of leading questions based on the contents of the typed statement, the truth of which Brown denied at trial, the trial judge deprived the petitioner of his right to be confronted by the witnessess against him in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner's second contention is that the use of the typed statement as a factual basis for leading questions, and as a prior inconsistent statement, violated the petitioner's right to due process of law guaranteed by the Fourteenth Amendment. Petitioner's basis of contention is that the prosecution failed to establish, and the trial judge failed to make a preliminary determination in the absence of the

jury, that Brown's statement to the police was made voluntarily.

A third contention, jurisdictional in nature, is that petitioner has exhausted his state remedies and, therefore, that his two substantive contentions are properly before this Court.

The Magistrate determined that petitioner had exhausted his available state remedies, but found no merits in his two substantive contentions and, therefore, recommended allowance of Respondent's Motion to Dismiss for failure to state a claim. For the reasons set forth below, we agree with the Magistrate's conclusions that petitioner has exhausted available state remedies, and that petitioner's first substantive contention involving confrontation is without merit. On the other hand, we do find merit in petitioner's second due process contention and, therefore, direct that a Writ of Habeas Corpus be issued under the terms and conditions of the accompanying order.

Exhausion of Available State Remedies

With respect to exhaustion, we conclude that the issues now raised were before the Supreme Judicial Court, partially during oral argument and fully at pages twenty through twenty-seven of Defendant's Brief. The Supreme Judicial Court treated these issues as follows:

> Furthermore, there was no error in allowing the Commonwealth to introduce Brown's statement for impeachment purposes. [case cited] In compliance with the requirements of G.L. c. 233, § 23, the witness was fully apprised of the time, place, and content of the prior statement, and was given full opportunity to explain it. The jury were clearly instructed that they were to consider this only as affecting the witness' credibility. Also, in his charge the judge rather

> elaborately reemphasized what he had previously stated to the jury in this regard. In addition, other testimony was adduced outside the Brown statement which linked the defendant to the crime. This fact distinguishes this situation from those to which the defendant has called our attention in certain cited Federal cases. [cases cited]

Commonwealth v. *LaFrance*, 1972 Adv. Sheets 177, 180-81, 278 N.E. 2d 394, 397 (Opinion by Justice Reardon).

Factual Basis of Petitioner's Substantive Contentions

A rather exhaustive exposition of the circumstances surrounding the witness Brown's testimony is a necessary prelude to a substantive analysis of petitioner's claims of constitutional error.

On direct examination, Brown testified that he had been with the petitioner at another's apartment in Taunton during the evening on which the automobile accident occurred, and that he and petitioner did not leave that apartment until 8:15 A.M. on the following morning. Tr. 136-140.

The prosecutor then inquired about a conversation which Brown had with the police on October 13, 1970. Brown testified that he was "taken down" to the Taunton police station at approximately 12:45 p.m., and at approximately 7:00 p.m. signed a statement which the police had typed out. Tr. 141-42. He testified that, prior to his signing, the police "said they didn't like something I said. And so, I wanted to go down myself, so I told them to put down what they wanted, and I would cross out anything, you know, or initial it." Tr. 143.

The trial judge then ordered Brown to approach the bench and, in response to the prosecutor's inquiry, Brown acknowledged his signature on the statement. Tr. 143. The prosecutor repeated his question as to whether Brown and

petitioner had left the apartment that evening, and again Brown answered "No". Tr. 143-44. Brown denied that petitioner picked him up that evening at Andy's Market in "a dark-colored Chevrolet, four-door, hard-top sedan." Tr. 144.

Over petitioner's objection and exception, the trial judge ruled that he would allow leading questions. Tr. 145. The prosecutor then proceeded to paraphrase to the jury Brown's prior statement in the form of a series of leading questions. Tr. 146-47; see also Tr. 157-69. Brown was asked whether he knew the car was stolen; he answered that "there was no car." Tr. 145. Brown answered each of the following questions in the negative:

> Did you then go to Attleboro with Mr. LaFrance in the car? When you got to Attleboro, did you notice that the friend who you went to see, his mother was home? Did you notice that? And so that you didn't stop, and rode by the house a couple of times? Did you then head back towards Taunton, through Norton, by Union Road? Did you then pick up a hitchhiker either going to Attleboro or returning, and drop him off at his home location, which is unknown to you? Did you then head towards Taunton? Did you then tell LaFrance that you wanted to get a road runner? Did you then go to sleep; and then realize that you had hit something? Did you then turn to LaFrance and say, "You just hit something." And did Pete reply to you, "Big fucking deal. I don't give a fuck"? Did you then turn down some streets which were not known to you, and come out by a cemetery at the Paul Dever School? Did you go through the school grounds and come out on Bassett Street? Did you then go down Bay Street and have Pete drop you off at Carlo's Cafe on Whittenton Street? Did you get

> out of the car there and go over to Joey's, because that is where you woke up the next morning?

Tr. 146-47. Brown then again asserted that he had been with petitioner "all that night." Tr. 148.

Over petitioner's objection and motion to strike Brown's testimony, the trial judge ruled that the prior statement could be used to impeach Brown's testimony. Tr. 148-49.

Before impeaching Brown with the statement, the prosecutor asked him, in the presence of the jury, if the statement was given of his "own free will, after having been advised of [his] rights", and Brown answered "No." Tr. 149-50. Brown then testified that he was threatened that night by police officer Dale Clark who said several times that "if it took a million years, he [Clark] would see [Brown] swing for this." Tr. 150-51. Brown asserted that he had not provided all the information that appeared in the signed statement, Tr. 153-54, but rather had told the police that night that "anything they wanted to type down there they could type to their heart's content, and I [Brown] would sign it so I could go back to myself." Tr. 160, and that "whatever they said, I would agree with it." Tr. 153.

Brown explained his prior statement, the truth of which he denied in court, Tr. 136 et. seq., by noting:

> "That day that I got arrested, I was doing dope that day, too, and they kept me up there; you know, they kept asking me. So, after a while . . . my mind was going crazy. I told [the police] anything they said. They just kept asking me the same questions over and over. I told them I would say anything, just to get back to myself."

Tr. 155-56.

Later in response to the judge's direction to "give

the jury any explanation you want to about that statement. . . ." Brown testified:

> "The day that they picked me up to make this statement, it was about one o'clock, and I was brought to the Taunton Police Station. And just before they picked me up, I had some more 'dollies'. I had about seven; and they came down and they questioned me for awhile.
>
> And then the Taunton cops took me out, took a car and took me through the woods to see if they could find the car.
>
> They didn't find anything, so they brought me back; and then the Norton cops were talking to me again. and they kept me up there; and I said I didn't want to talk anymore; I wanted to go back to my cell. I was getting real nervous and everything, you know, because it was getting late.
>
> And, so, after awhile my mother and father came, and I told them to tell the cops to leave me alone; I didn't want to talk with them until I saw a lawyer. My mother and father told them they didn't want me to do anything until I saw a lawyer. So the cops promised them that they would take me back to the cell after my mother and father left.
>
> My mother and father left, and they still kept me up there.
>
> I just got out of Bridgewater, and I was real nervous, doing the 'dollies' and everything. And they just made me nervous. Man, I was scared.
>
> They said they weren't going to let me go back down to my cell until I made that statement. They said they were going to charge me with it; and then I kept telling them I didn't want to talk anymore.

> They kept saying that; after awhile, I was starting to crack up. I didn't want to come back to Bridgewater, because that is nasty there.
> They said if I would sign it, they would let me go back to my cell. So I did."

Tr. 173-74.

All of Brown's testimony took place in the presence of the jury. The judge instructed the jury that "this [impeachment] testimony goes to the credibility that you will attach to [Brown's] story", Tr. 150, and is not itself substantive evidence. Tr. 178-79.

After the testimony of Brown, the Commonwealth called Officer Dunlap, a policeman who had been present at Brown's questioning. On objection to Dunlap's testimony, defense counsel inquired whether it was being offered only to impeach Brown and the trial judge answered "yes; corroboration." Tr. 181.[1]

Dunlap then testified that on the day Brown had made the statement to the police, he "appeared apparently normal" compared with the only other time he had seen Brown, Tr. 181, and that the statement contained all of the information that Brown gave the police. Tr. 183. Dunlap noted that after the statement was typed, "I read the statement to him to make sure he understood it before he signed it." Tr. 183.

Bernard Hanrahan, an investigator for the Registry of Motor Vehicles who was present during Brown's question-

[1] After the Commonwealth's examination of Officer Dunlap was completed, the defense counsel moved that the jury be instructed that this portion (that which followed the testimony of Brown) of Officer Dunlap's testimony was only to be considered for purposes of impeaching Brown's credibility; the defendant's exception was saved to the trial court's decision to "let [the testimony] stand". Tr. 184.

ing, testified for the Commonwealth that "Brown broke down and shook and wept" under the questioning. Tr. 212.

Neither Dunlap nor Hanrahan contradicted Brown's assertion that he had been threatened repeatedly by Officer Clark. And Clark himself, who had testified previously, see Tr. 43 et. seq., was not called to rebut Brown's allegations.

The defendant took the stand and testified that he and Richard Brown spent the entire night of October 6, 1970 in an apartment and did not leave until the following morning. Tr. 220 et. seq.

Petitioner's Confrontation Contention

Petitioner contends first that he was deprived of his right to confront the witnesses against him, U.S. Const. amend. VI, XIV, when the prosecution was permitted to put before the jury the contents of Brown's out-of-court statement, the truth of which was denied by Brown at trial.

The petitioner "relies upon a rule similar to that enunciated in *Bruton* v. *United States*, 391 U.S. 123." Petitioner's Memorandum of Law, at p. 3. In *Bruton*, there was testimony at a joint trial of an oral confession given by the co-defendant which implicated Bruton in the robbery. The trial judge limited this evidence to the case against the co-defendant and instructed that it was inadmissible against Bruton. The co-defendant did not take the stand. The Supreme Court held that "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of [the co-defendant's] confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.' 391 U.S., at 126.

The Court emphasized:

> The unreliability of [accomplice] evidence is intolerably compounded when the alleged accomplice, as here, *does not testify and cannot be tested by cross-examination.*

391 U.S., at 136 (emphasis supplied).

> Plainly, the introduction of [the co-defendant's] confession added substantial, perhaps even critical weight to the Government's case in a form not *subject to cross-examination, since [the co-defendant] did not take the stand.* Petitioner thus was denied his constitutional right of confrontation.

391 U.S., at 127-28 (emphasis supplied).

Petitioner places further reliance on *Douglas* v. *Alabama*, 380 U.S. 415 (1965). In *Douglas*, two persons, Lloyd and Douglas, were tried separately for assault with intent to murder. Lloyd was tried first and convicted. At Douglas' trial, the state called Lloyd as a witness. Although Lloyd invoked the privilege against self-incrimination, the prosecutor was permitted to treat him as a hostile witness and questioned him by asking him to confirm or deny statements read from a document purported to be Lloyd's confession. These statements incriminated Douglas. Lloyd refused to answer each question. The Supreme Court held that Douglas' inability to cross-examine Lloyd as to the alleged confession denied him the right of cross-examination guaranteed by the Confrontation Clause. 380 U.S., at 419. The Court concluded that the opportunity to cross-examine the law enforcement officers regarding the confession's genuineness was inadequate to redress the deprivation of cross-examination of Lloyd to test its truth. 380 U.S., at 419-20.

Petitioner's reliance on *Bruton* and *Douglas* is clearly misplaced. These cases involve incriminating out-of-court statements by declarants who were unavailable for cross-examination by the defendant at trial. At petitioner's trial, however, the out-of-court declarant (Brown) took the stand, asserted no privilege, and was available for "full and effective cross-examination" (see *California* v. *Green*, 399 U.S. 149, 158) by defendant's counsel.[2] Petitioner was thus not denied his right of confrontation.

The critical significance of this opportunity to cross-examine the declarant has been underscored by the United States Supreme Court. In *Nelson* v. *O'Neil*, 402 U.S. 622 (1971), the Court stated that the "confrontation" guaranteed by the Sixth and Fourteenth Amendments, and interpreted by *Bruton*, *supra*, is "confrontation *at trial* — that is, that the absence of the defendant at the time the co-defendant allegedly made the out-of-court statement is immaterial, so long as the declarant can be cross-examined on the witness stand at trial." 402 U.S., at 626.

Emphasizing that *Bruton* was a situation in which the co-defendant declarant did not take the stand, the Court reaffiremed its observation in *California* v. *Green*, 399 U.S. 149, that:

> "[T]here is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *Id.*, at 158. Moreover, "where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem." *Id.*, at 162.

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[2] Defense counsel chose not to cross-examine Brown. See Tr. 179.

402 U.S., at 626-27.

The Constitution "is violated *only* where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for 'full and effective' cross-examination", 402 U.S., at 627. The declarant in the instant case was not unavailable. Petitioner, therefore, has suffered no deprivation as to his right of confrontation.

Petitioner's Due Process Contention

Petitioner's second contention attacks the prosecution's permitted use of the witness Brown's typed statement as a factual basis for leading questions and as a prior inconsistent statement without there having been a preliminary determination by the judge as to the validity of Brown's testimony that his statement was involuntary.

Clearly if the statement in question had been that of the petitioner, as opposed to the witness Brown, it could not have been used for any purpose until there had been a reliable determination of voluntariness by the trial judge. *Jackson* v. *Denno*, 378, U.S. 368, 391 (1964).[3] And the judge's conclusion that the confession was voluntary would have to appear from the record with "unmistakable clarity." *Sims* v. *Georgia*, 385 U.S. 538, 544 (1967).

One of the basic underpinnings of a fair trial is the concept that testimony or evidence which is unreliable or untrustworthy must be rejected. This doctrine is not only supported by *Bruton*, but is underscored as well by *Harris*

[3] The *Jackson* Court gave its approval to the Massachusetts procedure for dealing with confessions of a defendant, "under which the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused. . . ." 378 U.S., at 378. The jury, then, hears only those confessions which a "judge actually and independently determines to be voluntary. . . ." 378 U.S., at 378 n. 8. The jury may, of course, disagree with the judge's finding of voluntariness and ignore the confession. *Id.*

v. *New York,* 401 U.S. 222 (1971) in which the Court held that a statement inadmissible against a defendant because of the failure of the police to give adequate *Miranda* warnings may, *if its trustworthiness satisfies legal standards,* be used for impeachment purposes to attack the credibility of the defendant's testimony. The Court noted specifically that Harris made no claim that the statements he made to the police were coerced or involuntary. 401 U.S., at 224.

Given the proposition that a coerced confession is unreliable and must, therefore, be excluded, it is illogical to permit the use of evidence coerced from a witness. Such evidence is no more reliable or trustworthy than is a coerced confession. As a practical matter it may well be less reliable. So-called key witnesses are often potential defendants as well. Their interest in self-preservation may motivate them to avoid or reduce the likelihood of direct involvement by laying the blame elsewhere. Even a witness not faced with potential prosecution may be less motivated toward resisting coercion than would a target defendant. He may succumb to undue pressure for no other reason than to be left alone and allow to go on his way. According to the witness Brown's sworn testimony, this is precisely what motivated him in the instant case.

Coerced testimony from any source is inherently unreliable and, therefore, suspect beyond redemption. Such testimony merits no consideration in the judicial process. The concept of a fair trial is far from an academic proposition to one forced to defend charges of criminal activity. It would be naive to presume that false testimony of a key witness could be anything but potentially "devastating" to a defendant. See *Bruton* v. *United States,* 391 U.S. 123, 136.

The issue before us is precisely that faced by the California Supreme Court in the case of *People* v. *Underwood,* 61 Cal. 2d 113, 389 P. 2d 937 (1964) (en banc). *Underwood*

involved a fact situation very similar to the instant case. There a witness testified that his prior statements were "forced on" him; that he was intoxicated when questioned by the police; that he was then in custody as a suspected accomplice to the crimes; and that he had been threatened during questioning by the police with prosecution for the crimes. 389 P. 2d, at 943.

Chief Justice Gibson, writing for the Court, concluded:

> The same policy considerations which preclude the use of an involuntary statement of a defendant require that the prosecution be precluded from impeaching any witness by the use of an involuntary statement given as the result of pressures exerted by the police. Such a statement by a witness is no more trustworthy than one by a defendant, its admission in evidence to aid in conviction would be offensive to the community's sense of fair play and decency, and its exclusion, like the exclusion of involuntary statements of a defendant, would serve to discourage the use of improper pressures during the questioning of persons in regard to crimes.

61 Cal. 2d, at 124, 389 P. 2d, at 943. The Court held that "error was committed in the impeachment of [the witness] by statements which, according to the uncontradicted evidence, were involuntary." 389 P. 2d, at 943.

It was recognized some twenty-five years ago by Justice Frankfurter that the admission into evidence of an incriminatory statement coerced from a third-party may violate the defendant's rights under the Fourteenth Amendment. *Turner* v. *Pennsylvania*, 338 U.S. 62, 65-66 (1949). See also *Hysler* v. *Florida*, 315 U.S. 411 (1942) (dissenting opinion of Justice Black). More recently, the Seventh Circuit Court of Appeals has observed:

> We are not unmindful that a case might well arise where the procurement of evidence to be used in a federal prosecution might have been obtained by proved coercion violative of the constitutional rights of a *witness* and that a serious question might arise in that event upon the use of such evidence upon the trial of defendant. However, such a case is not before us now. . . .

United States v. *Wolfe*, 307 F. 2d 798, 801 (7th Cir. 1962).

And the Fifth Circuit Court of Appeals, emphasizing that "voluntariness is the first and foremost safeguard and 'indicia of reliability' of a confession," has recognized the wisdom of holding a *Jackson* v. *Denno*, - type hearing to determine the voluntariness of an extrajudicial confession of a co-principal witness which also incriminates the defendant. *Hoover* v. *Beto*, 467 F. 2d 516, 533 (5th Cir. 1972), *cert. denied* 409 U.S. 1086. See also *Bradford* v. *Michigan*, 394 U.S. 1022 (1969) (dissent from denial of certiorari).

The Supreme Court of Illinois has held, in accord with *People* v. *Underwood*, *supra*, that the voluntary character of a witness' incriminating extra-judicial statement must be established before the statement can be admitted for impeachment purposes. *People* v. *Newman*, 30 Ill. 2d 419, 197 N.E. 2d 12 (1964); *People* v. *Tate*, 30 Ill. 2d 400, 197 N.E. 2d 26 (1964). See also, *People* v. *Bacon*, 2 Ill. App. 2d 324, 276 N.E. 2d 782 (App. Ct. of Ill. 1971); Comment, "The Right of a Criminal Defendant to Object to the Use of Testimony Coerced From a Witness," 57 N.W.U.L.R. 549. In *Newman*, the witness gave uncontradicted testimony that her statement to the police was made when she was seven months pregnant, and was the result of her being told that she would have to stay in jail and have her baby there. 197 N.E. 2d, at 14.

In the case before us, the uncontradicted evidence was that Brown's statement implicating petitioner was the product of some seven hours of police questioning in which Brown himself was threatened with prosecution. It was Brown's testimony that on the day he signed the statement he was under the influence of drugs, and that the statement was largely the result of suggestion by the police as to what had happened. Finally, Brown emphatically denied the truth of the statement on the witness stand.

Faced with Brown's assertion of involuntariness, petitioner's constitutional right to due process compelled the trial judge to make an independent reliable determination as to the voluntariness[4] of the statement before it was heard by the jury. See *Jackson* v. *Denno*, 378 U.S. 368 (1964).

The fact that Brown's statement was admitted for impeachment purposes only, and not as substantive evidence, see Tr. 150, 178-79, does not permit a different conclusion. The Supreme Court has recognized that incriminating extrajudicial statements from an accomplice present a unique situation "in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton* v. *United States*, 391 U.S. 123, 135 (1968).

Furthermore, there was error even if we assume that the lengthy uncontradicted testimony as to voluntariness which took place before the jury was a form of preliminary inquiry sufficient to satisfy constitutional requirements, and that the judge's admission of the evidence for impeachment purposes could be assumed to be a preliminary determination of voluntariness. Faced with the issue of vol-

[4] For a recent discussion of the test of voluntariness, *see Schneckloth* v. *Bustamonte*, — U.S. — (1973) (41 L.W. 4726).

untariness, a trial judge must not only make a preliminary determination of the issue, he must also afford the jury the opportunity to pass on the question of whether a witness' statement was voluntary or coerced. See *Jackson* v. *Denno*, 378 U.S. 368 (1964). In the instant case it was error for the trial judge to charge the jury, without any appropriate instruction as to voluntariness, that it was permissible to consider the statement for purposes of impeachment. *People* v. *Underwood*, 61 Cal. 2d 113, 389 P. 2d 937, 943 (1964).

Finally, we are unable to "declare a belief that [the constitutional error discussed above] was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). It is apparent from a review of the evidence (summarized in *Commonwealth* v. *LaFrance*, 1972 Adv. Sheets 177, 278 N.E. 2d 394) that this is not a case in which "the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Schneble* v. *Florida*, 405 U.S. 427, 430 (1972) ("[T]he allegedly inadmissible statements . . . at most tended to corroborate certain details of petitioner's [own] comprehensive confession." 405 U.S., at 431). See also *Brown* v. *United States*, —— U.S. —— (1973), 41 L.W. 4475 ("The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontradicted evidence properly before the jury." 41 L.W. 4478); *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969).

Error such as that committed in the instant case has been deemed sufficiently fundamental so as to require appellate review even in the absence of timely objection at trial. *See People* v. *Underwood*, 61 Cal. 2d 113, 389 P. 2d

937, 944 (1964). *See also Blackburn* v. *Alabama*, 361 U.S. 199, 210-11 (1960).

On the basis of "our own reading of the record and on what seems to us to have been the probable impact [of Brown's testimony] on the minds of an average jury," *Harrington* v. *California*, 395 U.S. at 254, we conclude the evidence was sufficiently prejudicial to petitioner so as to require reversal of his conviction.

The Writ of Habeas Corpus will issue, and respondent is ordered to release the petitioner forthwith.

(s) JOSEPH L. TAURO,
United States District Judge.

APPENDIX D.

ORDER DENYING RESPONDENT'S MOTION FOR STAY.

Respondent has filed a motion to stay this Court's allowance of petitioner's request for issuance of a Writ of Habeas Corpus. See District Court Opinion October 9, 1973.

The sole contention raised by respondent in support of its motion is that respondent was not afforded an evidentiary hearing prior to our determination on the merits. We find this contention to be without merit.

This petition was originally assigned to the Magistrate by Judge Murray under the following order:

> "It is hereby ORDERED that he above-entitled case be referred to Magistrate Peter Princi to hear the parties, examine their pleadings and evidence, and report to the court his findings together with his recommendations whether there should be a hearing in this case."

Following a hearing and submission of memoranda, the Magistrate recommended allowance of respondent's motion to dismiss. * A hearing was held by the Court on June 11, 1973 concerning the allowance of the Magistrate's Report. At this hearing petitioner's counsel submitted a memorandum of law; respondent's counsel offered no additional evidence or memoranda.

Following the hearing, the Court by letter to counsel for the petitioner dated July 11, 1973, a copy of which was sent to counsel for the defendant, requested a copy of the state court transcript. This was filed with the Court on July 17, 1973 without objection from the respondent's

* See Memorandum, Findings and Recommendation dated January 22, 1973.

counsel. After review of the Magistrate's report, the oral and written arguments of counsel, as well as the state trial transcript, this Court concluded the Writ of Habeas Corpus should issue.

Respondent's contention that this Court was without authority to issue said Writ is without merit. Respondent's position at oral argument on its motion to stay was that the Commonwealth has been *deprived of an opportunity* to present evidence. Such contention is unpersuasive for two reasons. It first of all ignores the fact that at the June 11, 1973 hearing, neither party indicated any desire to submit further evidence or memoranda of law. More significant, however, is the fact that at oral argument on its motion to stay, respondent acknowledged that, even if granted an evidentiary hearing, it would have no additional evidence to offer with respect to the substantive issues involved. Respondent further acknowledged that the only relevant evidence with respect to the substantive issues of this petition is the state trial transcript, which already has been reviewed by this Court in its determination of the merits.

Under these circumstances, it was appropriate for a decision to have been rendered on the merits. Conversely, it would have been a duplication of time and effort on the part of both counsel and the Court to require a third hearing on this matter, a hearing which would have involved no new material, but merely a second review of the trial transcript. See *Eisen* v. *Picard*, 452 F. 2d 860 (1st Cir. 1971).

Respondent having offered no further argument in support of its motion to stay, and there appearing no circumstances warranting its allowance, said motion is hereby denied.

(s) Joseph L. Tauro,
United States District Judge.

Date: 10/10/73

APPENDIX E.

MEMORANDUM, FINDINGS AND RECOMMENDATION

on

RESPONDENT'S MOTION TO DISMISS.

January 22, 1973

PRINCI, U. S. M.

This matter was heard by me on November 13, 1972. Bernard Manning Esq., Asst. Attorney General, represented the respondent and Alexander Whiteside, II, Esq., represented the petitioner.

FACTS.

The petitioner is presently confined at M.C.I. Norfolk. He was convicted after trial in Bristol County Superior Court in February of 1971 on three indictments charging him with manslaughter, leaving the scene of an accident after causing personal injury, operating a motor vehicle without a license and operating so as to endanger.

The indictment and conviction resulted from the injury and death of one Paul Butler when he was struck by the defendant's automobile on October 6, 1970.

The petitioner was sentenced to a term of not more than six years, nor less than four years on the manslaughter indictment. The other indictments were placed on file after trial. He is serving only the manslaughter sentence.

At the trial, the prosecution called as it's witness, one Richard Brown, who testified that he had been with the petitioner in an apartment at the time of the automobile accident (October 6, 1970). The prosecution then showed him a typed statement which Brown testified he had signed on October 13, 1970 at the Taunton Police Station. After

reading the statement, Brown again denied having left the apartment on the evening of the accident. The prosecutor then asked Brown whether the petitioner had driven a Chevrolet pick-up truck to a designated location during that evening; Brown replied he had not.

In response to the petitioner's objection and exception to the questioning, the trial court ruled that it would allow leading questions. Brown was then asked whether he knew the car was stolen and he answered that there had been no car. Over objection and exception, the Assistant District Attorney continued to phrase questions from the contents of the statement and Brown answered the questions in the negative.

Thereupon, the trial court allowed impeachment of Brown by allowing the differences between leading questions which he had denied and the substance of the statement which he had signed to be shown.

During the questioning, Brown stated the statement had not been voluntary, but had been the product of suggestions and threats by the police at a time when he was suffering withdrawal from the use of drugs. The jury was present during the entire questioning from the contents of Brown's typed and signed statement and heard and saw this highly incriminating statement.

Petitioner's Contentions.

The petitioner contends:

1. That the use of leading questions put before the jury the contents of the typed statement, the truth of which Brown denied at trial, deprived the petitioner of his right to be confronted by the witness against him in violation of his 6th Amendment rights and the 14th Amendment.

2. That the use of the typed statement as a factual basis for leading questions and as a prior inconsistent

statement violated the petitioner's right to due process of law guaranteed by the 14th Amendment as the prosecution failed to show, and the trial court failed reliably to determine, that the contents of the statement had been given voluntarily by Brown to the police.

3. That he has in fact exhausted his State remedies.

Respondent's Contentions

The respondent contends:

1. That the petition does not state concisely and with substantial certainty sufficient facts necessary to constitute the cause of action in accordance with Rule 8 of the F.R.Civ.P.

2. That the petitioner has failed to exhaust his available State remedies in that the petitioner's contention in Paragraph 8 of his petition, raising a Federal issue, has never been heard by a State court.

3. That the petition fails to state a claim upon which relief can be granted.

Pertinent Rules and Law

The Court is satisfied that the petition is well drawn and is sufficiently concise and clear and is not violative of Rule 8 of the F.R.Civ.P.

Title 28 U.S.C. § 2254 provides that a prerequisite to Federal habeas corpus jurisdiction is that an appellant shall have exhausted his available remedies in the courts of the State. Section 2254(c) provides that he shall not be deemed to have exhausted his available State remedies if he has the right, under the law of the State, to raise, by any available procedure, the question presented.

The respondent argues here that the petitioner has raised a Federal question which was not raised in the Supreme

Judicial Court and therefore, it should be assumed that the ommission was due to want of proper presentation to the State courts, unless the aggrieved party can affirmatively show the contrary. *Street* v. *New York*, 394 U.S. 576, (1969).

The Commonwealth further contends that notwithstanding the fact that the petitioner has failed to present this issue to the Supreme Judicial Court, it is devoid of substance inasmuch as it has been held that even if the statement of Brown was obtained illegally, impeachment may be permitted by illegally obtained statements, therefore, there is no Federal question. *Walder* v. *United States*, 347 U.S. 62 (1954) and *United States* v. *Sanchez*, 349 F. 2d 354 (2d Cir. 1965).

Notwithstanding the contention of the Commonwealth that this issue was not presented to the Supreme Judicial Court, it would appear in *Commonwealth* v. *LaFrance*, 1972 Adv. Sheets 177 at page 180 that this issue was discussed. The Supreme Judicial Court said as follows:

> "Furthermore, there was no error in allowing the Commonwealth to introduce Brown's statement for impeachment purposes. [cases cited] In compliance with the requirements of G.L. c. 233 § 23, the witness was fully apprised of the time place and content of the prior statement, and was given full opportunity to explain it. The jury were clearly instructed that they were to consider this only as affecting the witness's credibility. Also, in his charge, the judge rather elaborately reemphasized what he had previously stated to the jury in this regard. In addition, other testimony was induced outside the Brown statement which linked the defendant to the crime. This fact distinguished this situation from those to which the defendant has called to our attention in certain cited federal cases."

It would appear, therefore, that though the Supreme Judicial Court may have not made a determination on the basis of a constitutional question with respect to the contentions here, this court is satisfied that any further appeal to the State court with respect to this issue would be futile.

Is There a Federal Question?

In order to determine whether in fact there is a Federal question, assuming arguendo that the petitioner's contention has merit, this Court will review relevant cases with respect thereto.

The petitioner apparently contends *first*, that the *Bruton* rule (*United States* v. *Bruton*, 391 U.S. 123 (1968)) should apply to a case where a witness or defendant actually takes the stand; *second*, that a statement by a witness or codefendant must be first affirmed to be his and made by him before he can be cross-examined on the statement; and *third*, that the *Bruton* rule applies even if the codefendant or witness takes the stand.

This is not the holding of the cases, nor is it the holding in *Bruton*. In *Bruton*, the Court specifically said that the introduction of a codefendant's confession added substantial, perhaps even critical weight to the government's case in a form not subject to cross-examination since the codefendant in *Bruton* did not take the stand. Consequently, the petitioner in *Bruton* was denied his constitutional right to confrontation.

In the instant case, Brown not only took the stand, but was subject to cross-examination at the trial. It is also important to note that here the trial judge stated to counsel and to the jury that the statement was being used only for the purpose of impeachment.

The confrontation guaranteed by the 6th and 14th Amendments is confrontation at trial; absence of the de-

fendant at the time his codefendant or even a witness allegedly made the out-of-court statement implicating the defendant is immaterial so long as the codefendant or witness can be examined on the witness stand at trial. *Nelson* v. *O'Neil*, 402 U.S. 622 (1971).

The Supreme Court of the United States has held that notwithstanding a confession may be tainted by illegality, it can nonetheless be used for impeachment purposes provided it satisfies the legal safeguards of trustworthiness. A confession was used in *Harris* v. *New York*, 401 U.S. 222 (1971), 91 S.Ct. 643 to impeach the defendant's credibility at trial. It is significant that in *Harris*, it was the petitioner himself against whom the confession was used and it would be ludicrous to believe that the petitioner stands in any better position than did *Harris*, whose own confession was used against him for impeachment purposes. The Court held in *Harris* that a statement inadmissible against a defendant in the prosecution's case in chief because of lack of procedural safeguards required by Miranda may, if its trustworthiness satisfies the legal standards, be used for impeachment purposes to attack the credibility of the defendant's trial testimony.

The Federal court again sustained the use of tainted testimony for the purposes of impeachment in *Walder* v. *United States*, 347 U.S. 62 (1954) at page 65, wherein the Court said:

> "It is one thing to say that the government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the government's possession was obtained to his own advantage and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks Doctrine would be a perversion of the 4th Amendment."

> "Of course, the Constitution guarantees a defendand the fullest opportunity to meet the accusations against him. He must be free to deny all the elements of the case against him without thereby giving leave to the government to introduce by way of rebuttal evi*dence illegally secured by it, and* therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the government's disability to challenge his credibility."

Certainly, the petitioner in this case with respect to witness Brown cannot stand in any better position than the defendant in *Walder.*

The record indicates that the use of the allegedly illegally obtained statement of Brown was used only for the purpose of impeachment. There is no allegation as to any other use. Under the circumstances, therefore, where no evidentiary use was made and this was clearly indicated by the judge to the jury, and the statement was used only for impeachment purposes, which under *Whipple* v. *Rich,* 180 Mass. 477 (1901) was permissible, the use of this statement was not a violation of the petitioner's constitutional rights. *United States* v. *Sanchez,* supra. In *Sanchez* too, it was the defendant's own statement that was used against him for that purpose.

The case perhaps most similar to the instant matter is *Lewis* v. *Yeager,* 411 F. 2d 414 (3d Cir. 1969) in which the Court said at page 414;

> "At the trial, the appellant himself called as a witness in his defense an alleged confederate who thereupon gave testimony tending to exculpate the appellant. The prosecution was then permitted to impeach the witness by introducing into evidence his prior in-

consistent statement incriminating the appellant. The Court accurately instructed the jury concerning the limited permissible use of this statement for impeachment purposes. Since the appellant himself had created the occasion for the use of the incriminating prior statement of the alleged confederate and the appellant was permitted to cross-examine the witness about that statement, this case presents no such unfairness as was present in the *Bruton* case."

The trial judge, at petitioner's trial, clearly instructed the jury that they were to consider this statement only as affecting the witness's credibility. He also re-emphasized what he had previously stated to the jury in this regard. Clearly, therefore, this aspect of the petitioner's claim was very well covered by the trial judge and reviewed by the Supreme Judicial Court. In the opinion of this court, he has no standing on any constitutional question with respect to the *Bruton* issue.

The petition relies heavily on three cases, which shall be reviewed individually as follows:

(1) *Douglas* v. *Alabama,* 380 U.S. 415, 85 S. Ct. 1074 (1965)

Douglas differs considerably from the instant matter inasmuch as in *Douglas,* the State defendant's opportunity to cross-examine law enforcement officers, who had testified that the document read by the prosecutor to the jury within the guise of cross-examination of the witness who had invoked privilege against self-incrimination was the confession of the witness, was not adequate to redress the denial of the defendant's right of cross-examination secured by the confrontation clause of the 6th Amendment. Clearly, there is no need of any further discussion with respect to this case as it differs so completely from the instant matter.

(2) *Young* v. *United States*, 97 F. 2d 200 (5th Cir. 1938)

Young is not inconsistent with the ruling in other cases hereinbefore stated (e.g. *Walder*) for in *Young*, the Court determined that the cross-examination was made an artifice to get before the jury favorable ex parte statements of a witness whose testimony was known to be adverse. In the instant matter, the jury was clearly instructed that the cross-examination on the prior inconsistent statement was only for the purpose of impeachment and to establish the credibility of the witness. In the opinion of this Court, *Young* is clearly distinguishable.

(3) *United States* v. *Rudolph*, 403 F. 2d 805 (6th Cir. 1968)

Rudolph involved a situation wherein the defendant was asked in cross-examination whether he participated in an unrelated criminal act. The Court held that this constituted prejudicial error which was not cured by the court's instructions. Clearly, such an examination would be prejudicial and it has been held on a number of occasions in this Court that a defendant may not be questioned as to whether he participated in unrelated specific acts of criminal conduct not resulting in a conviction as such evidence has no relevancy to the issue of the defendant's guilt or innocence of the crime charged, and such evidence is likely to be extremely prejudicial. This case is clearly distinguishable from the instant matter.

State Authority.

Clearly, the State has every authority to establish the procedure for the conduct of its criminal trials so long as there is no infringement of guarantees of the Federal Constitution. This has been clearly established in *Burgett* v. *Texas*, 389 U.S. 109 (1967). Nor is the State required to

follow the same procedures with respect to presentation of evidence as those adopted by the Federal court.

Finally, sufficiency of evidence does not rise to constitutional proportions and therefore present a Federal question. Presentation of evidence and procedures are usually left completely to the procedures in the State courts. *United States ex rel Yacobellis* v. *McKendrick*, 332 F. Supp. 1216 (E.D. N.Y. 1971).

CONCLUSION AND RECOMMENDATION.

On the basis of the foregoing, the Court finds as follows:

1. That the petitioner has exhausted his State remedies or that in the alternative, further proceedings in the State courts would be futile.

2. That the petitioner had a fair and adequate hearing in the State courts and the issue presented in this petition was reviewed by the Supreme Judicial Court.

3. That the petitioner has not stated a claim upon which relief may be granted.

On the basis of the foregoing, therefore, it is recommended this motion be GRANTED.

(s) ILLEGIBLE,
United States Magistrate.

APPENDIX F.

COMMONWEALTH *v.* PETER F. LaFRANCE.

Bristol. November 1, 1971.—February 4, 1972.

Reardon, J. The defendant appeals in a case made subject to G.L. c. 278, §§ 33A-33G, from convictions on four indictments charging him with manslaughter, leaving the scene of an accident after causing personal injury, operating without a license, and operating so as to endanger. We consider several assignments of error.

1. The defendant alleges error in the denial by the trial judge of motions for directed verdicts on grounds of insufficient evidence. The evidence is summarized as follows.

On October 6, 1970, around 11 P.M., James Butler went to the assistance of his son Paul whose car was stalled on Route 140 between Taunton and Norton in the southbound breakdown lane, with parking lights illuminated. It was a clear evening and the road was dry, with medium traffic. He drove by his son's car and proceeded to back up to it in order to attach a tow chain. As Paul was directing his father at a position by the left rear mudguard of his father's car, he was struck by a car proceeding southbound at a speed in excess of fifty miles an hour, and dragged approximately 121 feet. This car did extensive damage to the side of James Butler's car. About 500 feet down the road the lights of the car were extinguished and it kept going. Within several minutes the police arrived and took Paul to a Taunton hospital where he was pronounced dead on arrival, having sustained a fractured skull and internal injuries.

About 9 P.M. on the same day the defendant and one Richard Brown had gone to the apartment of one Joseph Machado in Taunton. They were asked by Mrs. Machado to "watch the house" while Machado, his wife, and two cousins went to a store. When the Machados returned in the early morning of October 7, the defendant told them

about an accident on Route 140. Thereafter the defendant and Brown spent the night at the Machado apartment, leaving before Machado arose the next morning. They returned that afternoon, at which time Mrs. Machado informed them they were being blamed for "a murder." They appeared to be "shook up," and asked her to verify that they were present in the apartment all of the previous night. Another witness to this conversation described the defendant as looking "scared" at the time. Brown then stated he was going to get some money from his grandmother. He returned later in the afternoon and said he had been unable to procure any. Either Brown or the defendant then said, "We better ditch it."

On October 7, one Wendall Frost received a call from the defendant, whose voice he recognized, asking him if he had any money, and stating that he "wanted to take off." In response to an inquiry for the reason, the defendant related his involvement in the accident, and although Frost in testimony was somewhat confusing in his language, on cross-examination he did state that the defendant said that "he hit Paul."

On October 13 and 14, the Taunton police interviewed the defendant and Brown at the police station. At this time Machado appeared in response from a call from the police and, according to him, was advised by the defendant, "Tell them that you were there and you got home at 10. You didn't leave; you stayed home." Machado, however, told the police that he did not arrive home until 12:30 A.M. on October 7. Upon hearing this statement the defendant commenced to cry.

Brown testified for the Commonwealth to the effect that they had been at the Machado apartment on October 6 and until 8:15 A.M. the next morning, and that the Machados returned to their apartment at 11:15 P.M. He stated he had

taken methadone pills that night beginning around 6 P.M., and denied any knowledge of a telephone call to Frost.

The defendant testified that he had been in the Machado apartment consistently through the night of October 6, and that the Machados returned about 10 P.M. on that evening. He denied the telephone call to Frost or talking about "ditching it." He claimed that Brown had made a telephone call to Frost, denied telling Machado that there was an accident on Route 140, and admitted taking three methadone pills that night. He stated this was the first time he had been "high" on methadone and that he didn't know whether he would have been in a condition to drive a car.

We are of the opinion that the evidence, the sufficiency of which is challenged by the defendant, was more than adequate for the jury to have concluded that the defendant and Brown were in the motor vehicle which struck and killed Paul Butler. The defendant's knowledge of the accident shortly after it occurred, his efforts to obtain alibi testimony from the Machados, and his admissions of guilt in his telephone call to Wendall Frost strongly support that conclusion. The defendant argues, and with warrant, that Frost's testimony was confusing on the point whether the defendant ever stated to him that he, rather than Brown, was the driver of the hit and run vehicle. The question is close but the jury could have credited the Frost assertion that the defendant said, "he hit Paul," and disregarded his assertions elsewhere that the defendant said, "They hit Paul." This is in accordance with the rule that "if a witness in testifying makes inconsistent statements, the jury may believe some of the statements and disregard others." *Kettleman* v. *Atkins*, 229 Mass. 89, 92. See *Lowell* v. *Boston Storage Warehouse Co.*, 280 Mass. 234, 237.

The jury also could have found that an unlicensed driver under the influence of drugs driving a car in excess of the legal speed limit struck the decedent, dragged him 121 feet

and then sped away with extinguished lights. On these facts the Commonwealth's burden of proof of showing wanton and reckless conduct was fully sustained. *Commonwealth* v. *Arone*, 265 Mass. 128. See *Bellenger* v. *Monahan*, 282 Mass. 523, 528; G.L. c. 90, § 24(1)(a), as amended through St. 1963, c. 369, § 2.

2. The defendant argues, in assignment of error No. 2, that the trial judge erred "[i]n permitting the prosecution to ask Richard Brown questions, the purpose and effect of which were improperly to put before the jury the contents of a statement which Richard Brown allegedly had made to the police outside the defendant's presence and which [were] . . . inadmissible hearsay. The defendant contends that these questions were prejudicial to him by their suggestion that he was guilty of the crimes for which he was indicted."

The content of Brown's statement, given to the police on the night of October 13-14, was that he and the defendant had driven to Attleboro in a stolen car, returned to Taunton, struck Paul Butler, and had taken methadone earlier that night. When called to the witness stand by the Commonwealth, Brown denied that he and the defendant ever left the Machado apartment the night of October 6-7. The judge could have found that Brown was a hostile witness and allowed the prosecution to cross-examine him. *Commonwealth* v. *Coshnear*, 289 Mass. 516, 527. *Commonwealth* v. *Hartford*, 346 Mass. 482, 487. Leading questions in these circumstances were not improper, *Commonwealth* v. *Granito*, 326 Mass. 494, 498, and no abuse of discretion was shown, *Commonwealth* v. *Coshnear*, *supra*, 527.

Furthermore, there was no error in allowing the Commonwealth to introduce Brown's statement for impeachment purposes. *Goodney* v. *Smith*, 354 Mass. 734, 737. In compliance with the requirements of G.L. c. 233, § 23, the

witness was fully apprised of the time, place, and content of the prior statement, and was given full opportunity to explain it. The jury were clearly instructed that they were to consider this only as affecting the witness's credibility. Also, in his charge the judge rather elaborately reemphasized what he had previously stated to the jury in this regard. In addition, other testimony was adduced outside the Brown statement which linked the defendant to the crime. This fact distinguishes this situation from those to which the defendant has called our attention in certain cited Federal cases. See *Douglas* v. *Alabama*, 380 U.S. 415; *Young* v. *United States*, 97 F. 2d 200, 205-206 (5th Cir.); *United States* v. *Rudolph*, 403 F. 2d 805, 806 (6th Cir.).

3. Finally, the defendant argues that the judge erred in refusing to instruct the jury that Officer Richard Dunlap's testimony concerning the statement which Brown had signed was admissible only for impeachment. Notwithstanding what Brown had testified, the officer, one of his interrogators, stated that he was normal when his statement was taken. When defence counsel asked, "Is this [the statement] to be offered as to impeach Brown only?", the judge replied, "Yes; corroboration." Thereafter counsel sought again to have the judge instruct the jury that Dunlap's testimony was offered solely to impeach. The judge refused this request and denied a motion that the testimony be struck. It is our view that the judge's earlier affirmative response to counsel's question constituted a sufficient ruling on this matter. Moreover, the judge had previously given explicit instructions that Brown's statement to the police was to go only to the question of his credibility. We thus cannot agree with the defendant's contention that the judge's failure to grant the requested instructions permitted the jury to consider the statement as substantive evidence against Brown.

Judgments affirmed.

APPENDIX G.

PETITION FOR WRIT OF HABEAS CORPUS.

Now comes the petitioner, Peter F. LaFrance, and petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. The petitioner respectfully represents and says:

I

The petitioner is confined at the Massachusetts Correctional Institution at Norfolk.

II

The respondent is the Superintendent of the Massachusetts Correctional Institution at Norfolk and has custody of the petitioner.

III

The petitioner was indicted in February, 1971 by a Bristol County indictment (No. 36026) which charged him with manslaughter; he was also indicted by Bristol County indictments (Nos. 36027, 36028 and 36029) which charged him with leaving the scene of an accident after causing personal injury, with operating a motor vehicle without a license, and with operating a motor vehicle so as to endanger. The petitioner was jointly tried on the indictments before Justice Smith and a jury in February, 1971 in the Bristol County Superior Court. These indictments concerned an episode on October 6, 1970 wherein one Paul Butler had been struck and killed by an automobile.

IV

At the trial the prosecution called as a witness one Richard Brown, who testified that he had been with the peti-

tioner in an apartment at the time of the automobile accident on October 6, 1970. The prosecution then showed to him a typed statement which Brown testified that he had signed on October 13, 1970 at the Taunton Police Station. After reading the statement Brown again denied having left the apartment on the evening of the accident. The assistant district attorney then asked Brown whether the petitioner had driven a Chevrolet to pick him up at a designated location during that evening; Brown replied that he had not. In response to the petitioner's objection and exception to the questioning, the trial court ruled that he would allow leading questions. Brown was then asked whether he knew the car was stolen, and he answered that there had been no car. Over objection and exception the assistant district attorney continued to phrase as questions the contents of the statement; the questions, which Brown answered in the negative, were as follows:

> Did you then go to Attleboro with Mr. LaFrance in the car? When you got to Attleboro, did you notice that the friend who you went to see, his mother was home? Did you notice that? And so that you didn't stop, and rode by the house a couple of times? Did you then head back towards Taunton, through Norton, by Union Road? Did you then pick up a hitchhiker either going to Attleboro or returning, and drop him off at his home location, which is unknown to you? Did you then head towards Taunton? Did you then tell LaFrance that you wanted to get a road runner? Did you then go to sleep; and then realize that you had hit something? Did you then turn to LaFrance and say, 'You just hit something.' And did Pete reply to you, 'Big fucking deal. I don't give a fuck? Did you then turn down some streets which were not known to you,

and come out by a cemetery at the Paul Dever School? Did you go through the school grounds and come out on Bassett Street? Did you then go down Bay Street and have Pete drop you off at Carlo's Cafe on Whittenton Street? Did you get out of the car there and go over to Joey's, because that is where you woke up the next morning?

The trial court then allowed impeachment of Richard Brown by allowing the differences between the leading questions, which he had denied, and the substance of the statement, which he had signed, to be shown. During this questioning Brown indicated that the statement had not been voluntary but had been the product of suggestion and threats by the police at a time when he was suffering withdrawal from the use of drugs.

V

The purpose and effect of the prosecution's questioning set out in paragraph IV was to put before the jury the contents of the typed statement, which had been signed by Richard Brown and which was highly incriminating to the petitioner, and to provide inconsistent testimony in order that the contents of the typed statement again might be put before the jury ostensibly to impeach Richard Brown.

VI

After trial the petitioner was found guilty on all indictments and was sentenced on Indictment No. 36026 (manslaughter) to a term of not more than six nor less than four years; the petitioner is presently serving this sentence and no other. Indictments Nos. 36027, 36028, and 36029 were placed on file after trial.

VII

The prosecution's use of leading questions which put before the jury the contents of the typed statement, the truth of which Richard Brown denied at trial, deprived the petitioner of his right to be confronted by the witnesses against him in violation of his rights guaranteed by the Sitxth Amendment to the Constitution of the United States as applied to the states by the Due Process Clause of the Fourteenth Amendment.

VIII

The prosecution's use of the typed statement as the factual basis for leading questions and as a prior inconsistent statement violated the petitioner's right to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States because the prosecution failed to show and the trial court failed reliably to determine that the contents of the statement had been given voluntarily by Richard Brown to the police.

IX

The petitioner has exhausted his state remedies as required by 28 U.S.C. § 2254 by appeal under M.G.L. c. 278, § 33A-G. On appeal the petitioner argued the constitutional violations set out in paragraphs VII and VIII. The judgments of the Superior Court were affirmed by the Supreme Judicial Court on February 4, 1972. *Commonwealth* v. *LaFrance,* Mass. Adv. Sh. (1972) 177.

X

Because of the foregoing facts, the petitioner is being restrained of his liberty by the respondent in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States; the petitioner prays that:

1. A writ of habeas corpus be issued directing the respondent to produce before this Honorable Court the body of the petitioner together with the cause of his detention.
2. An order be entered discharging the petitioner from custody.
3. The petitioner be released on bail or personal recognizance pending such order.
4. This Court issue such other orders as may be appropriate.

By his attorney,

(s) ALEXANDER WHITESIDE II,
Massachusetts
Defenders Committee.